

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA, )  
                              )  
Plaintiff,                ) Case No. 16-CR-21  
                              ) Milwaukee, Wisconsin  
vs.                        )  
                              ) September 27, 2019  
SAMY MOHAMMED HAMZEH,     ) 9:30 a.m.  
                              )  
Defendant.                )  
                              )

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**TRANSCRIPT OF FINAL PRETRIAL CONFERENCE**  
BEFORE THE HONORABLE PAMELA PEPPER  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff  
UNITED STATES OF AMERICA:      United States Department of  
                                      Justice  
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Proceedings recorded by computerized stenography,  
transcript produced by computer aided transcription.

1           THE CLERK: Court calls criminal case 2016-CV-21,  
2 United States versus Samy Mohammad Hamzeh. Please state your  
3 appearance starting with the attorneys for the Government.

4           MR. TAIBLESON: Good morning, Your Honor. Benjamin  
5 Taibleson and Adam Ptashkin for the United States.

6           MR. ALBEE: Good morning. Craig Albee and Joseph  
7 Bugni appearing with Samy Mohammad Hamzeh. Also present at  
8 counsel table is Shavon Caygill, our paralegal.

9           THE COURT: Good morning, everyone. We are here this  
10 morning for final pretrial conference. Although I think  
11 everybody remembers, we also have kind of a semi-final pretrial  
12 conference on the calendar as well when we get closer to trial.

13           What I'd like to do is work through a number of issues  
14 this morning. I can't guarantee that we'll work through every  
15 single one of them and get you definitive answers on everything  
16 this morning, but maybe we can, at least, make some progress so  
17 that you all can see where some things are headed.

18           So the first thing I want to note that you all have  
19 already seen, I think, is that the jury questionnaire went out a  
20 few days ago, and I want just to make a record. As you all will  
21 remember, the original jury questionnaire was fairly extensive.  
22 And when I determined that the clerk's office was not going to  
23 send out 19 pages, they don't have the funds to be able to do  
24 that, I sent it back and asked if you all would make some  
25 revisions so that we could send out one that actually met the

1 length qualifications for the jury for the clerk's office. And  
2 what came back was pretty much the same number of questions,  
3 maybe more questions but in a more compact form. And I give the  
4 defense all sorts of credit for being creative with word or what  
5 it was you all did to do that.

6           What I had anticipated was that the process of  
7 condensing to three pages or basically six pages, three  
8 double-sided pages, is that we reduce the number of questions.  
9 I suppose I should have made that clear. I wanted that for a  
10 couple of reasons.

11           Number one, there are some of those questions that I  
12 didn't think were appropriate. Number two, quite frankly, I had  
13 some concerns about the potential jury pool getting this  
14 document that was a little bit longer than their usually tax  
15 return document and having some push back in terms of people  
16 just going, I'm going to figure out any way I can not to be a  
17 part of this trial even if, perhaps, I might be a decent juror.

18           And so I went through and removed a number of the  
19 questions that I didn't think were appropriate and that were not  
20 the sorts of questions that I would have allowed to be asked in  
21 in-person voir dire. I also modified a little bit the cover  
22 letter partly to make it seem a little bit more friendly and  
23 grateful that they would be willing to serve, which I think we  
24 all are. And so what ended up coming out are the questions that  
25 I felt comfortable putting in a questionnaire.

1           Now, I want to make clear I know that you all have  
2 submitted proposed voir dire to ask on the first day of trial,  
3 and I'm not saying that I won't ask some of the questions that  
4 you proposed or wouldn't allow some of the questions that you  
5 proposed in person. I think it's appropriate. I think that  
6 happens quite frequently anyway when we have jurors answer and  
7 we have follow-up questions because it leads to other questions,  
8 and so I'm not saying that I wouldn't necessarily go broader.  
9 But what I was trying to do here was to at least get some base  
10 information on what seemed to be some of the more critical  
11 issues, so that you'd have a starting point.

12           I also rephrased some of the questions in ways that I  
13 generally ask them and made some changes to the language. So  
14 all of that is by way of saying that some of the questions that  
15 I took out, and we'll come back and talk about this I suppose  
16 when we talk about the voir dire questions that I'm going to be  
17 asking -- will be asking at trial, but I took out all of the  
18 questions that asked jurors what their feelings are about  
19 reasonable doubt.

20           I don't normally ask those sorts of questions in jury  
21 selection because jurors are instructed that they have to follow  
22 the law as I give it to them. They must presume a defendant  
23 innocent, and they must not convict unless they're convinced  
24 beyond a reasonable doubt. And I'm concerned and I said this in  
25 other cases and I read other judges are concerned as well that

1 planting in the jury's mind that it's okay to not presume  
2 somebody innocent if they don't agree with that, that that's all  
3 right. Or if they don't agree with the fact that proof beyond a  
4 reasonable doubt is required by the law, that, you know, that's  
5 okay as long as they kind of let us know that.

6 I think those are issues on which we have to be firm,  
7 that there's not any option to disagree with those concepts.  
8 They are instructions that are given, and they must follow them.  
9 That is why I don't ask those sorts of questions because I'm not  
10 comfortable giving jurors the impression that they have any  
11 choice to conclude anything otherwise.

12 I also took out in this case the question about  
13 whether people belong to a Mosque, Synagog or other religious  
14 community and whether they have positions of leadership in their  
15 religious community. I think it's certainly appropriate to ask  
16 whether anybody's ever been a member of the Masons or any of  
17 their affiliated organizations. That's, clearly, an obvious  
18 question that's applicable here, but I'm concerned about  
19 intruding into the religious affiliations of jurors and whether  
20 or not they've had leadership positions in their religious  
21 affiliations.

22 I allowed some of the questions about people's  
23 feelings towards Muslims or people of Arab descent, but I think  
24 I modified them somewhat. One of the biggest areas of concern I  
25 have, and it's going to come up again as we talk about things

1 this morning, are questions with regard to people's knowledge of  
2 and views of conflict between the Arab-Israeli conflict. And  
3 one of the reasons I certainly did not want that in the  
4 questionnaire is that number one, as far as I can recall, and I  
5 indicated this in a ruling I issued recently, Mr. Hamzeh has  
6 simply been charged with possession of two unregistered machine  
7 guns and an unregistered silencer.

8 To the extent that there's evidence that he had  
9 conversations about other things, we'll be getting into whether  
10 or not those conversations are relevant, but the events that I  
11 think eventually lead to Mr. Hamzeh's arrest seem far removed  
12 from some conversations that he allegedly had early on during  
13 the investigation commenting about Arab-Israeli issues.

14 The parties have talked about whether or not there  
15 would be a "mini trial" about the Arab-Israeli conflict. I can  
16 assure you there's not going to be, because I'm not going to  
17 allow there to be. This trial cannot turn into that kind of an  
18 issue, and so I took out those questions. We can certainly talk  
19 about that issue in other contexts, and we will. But in terms  
20 of the jury questionnaire, I did not want to give potential  
21 jurors the idea that this was somehow a case about the  
22 Arab-Israeli conflict.

23 So there are other questions that you can see that I  
24 removed, and we can talk about whether or not some of those  
25 might be appropriate during an in-person voir dire, but I simply

1 wanted to make a record of the reason that I took out some of  
2 the questions that were in the proposed questionnaire. And  
3 hopefully, we'll start getting those responses back relatively  
4 soon, and you all will be able to take the information from that  
5 and process it.

6                 The second thing is that as you know, I recently  
7 issued a ruling on the defense's request to be able to present  
8 an entrapment defense, and I have indicated that the defense can  
9 present that defense. I want to make clear I think, I made it  
10 clear in the order, but I want to make clear again that number  
11 one, that means that the Government of course also has the right  
12 to present evidence to try to rebut that defense. I would  
13 anticipate that it will. But also that at this point in time,  
14 I'm not making a ruling on whether or not I will give a jury  
15 instruction as to entrapment. That is something that will  
16 depend on how the evidence comes in.

17                 I think as I indicated in the order, the defense has  
18 certainly put forward the weight of evidence that the *Mayfield*  
19 decision says that the defense needs to put forward to be  
20 allowed to present the defense. But the question of whether or  
21 not there's enough there to give an entrapment instruction I  
22 think depends entirely on how that evidence plays out at trial,  
23 and so we'll see what happens with the instructions once we get  
24 to that point and some of the evidence has come in.

25                 I understand that there is a discovery order that

1 Judge Duffin issued that the defense objected to that has been  
2 fully briefed. It was a Motion to Compel a number of pieces --  
3 that the Government turned over a number of pieces of different  
4 kinds of information. I'll tell you all that while you don't  
5 have the decision in your hands for the most part, I have  
6 completed that decision. And for the most part, my ruling is  
7 that I find nothing clearly erroneous in anything that Judge  
8 Duffin decided with regard to that discovery.

9           The one issue that I did have some concern about is  
10 that more recently, earlier this month, the defense filed a more  
11 precise request with regard to or more precise reasoning, I  
12 suppose, and more precise support for its request for the  
13 informant files and information in the informant files. When I  
14 say files plural, but really the defense request has to do with  
15 the confidential resource known as Mike. And the defense has in  
16 its own investigation come across information that leads it to  
17 believe that there may be concerning information in that file  
18 with regard to either Mike's involvement in possible criminal  
19 activity or Mike's expectation that because of his being an  
20 informant, that he had special protection whenever he might get  
21 in trouble or have issues with the law, and that's just a broad  
22 summary of what the defense's concerns are.

23           I think the information that's in that filing is  
24 certainly information that if the defendant has it, and I  
25 realize that some of the emphasis in that pleading we're not

1 saying necessarily this is evidence we have or are going to use,  
2 we're just putting forth concerns that we have, but that is  
3 certainly I think information that would be, at least, subject  
4 to discussion at trial about cross examination were Mike to  
5 testify. But the real issue that I think the defense was trying  
6 to raise is whether or not the information that it has uncovered  
7 leads to concerns that there may be something in the informant  
8 file that could be impeaching, and it should be turned over.

9           I guess one of my initial reactions to that is to ask  
10 the Government, you know, what -- first of all, I suppose,  
11 whether or not the Government has seen that file or has it?

12           MR. TAIBLESON: Judge, there's nothing in that file  
13 supporting any of the defense's suspicions asserted in their  
14 filing.

15           THE COURT: Does that mean you've seen it,  
16 Mr. Taibleson?

17           MR. TAIBLESON: That is, in fact, as part -- Well,  
18 it's challenging to --

19           THE COURT: I understand. It's an uncomfortable  
20 situation. I thought it would be a straightforward question in  
21 terms of have you seen it, but perhaps -- Are you aware,  
22 Mr. Taibleson, of whether or not there would be a way and if so  
23 how long it would take to present a file to the Court to view in  
24 camera?

25           MR. TAIBLESON: Your Honor, my understanding is that

1 should we do that, which if Your Honor wishes us to do, we'll do  
2 it. We would do it in keeping with the requirements of the  
3 Classified Information Procedures Act, which is going to require  
4 court information security officer who works for Your Honor to  
5 fly here, and we'll do that. If Your Honor orders us to do it,  
6 we will do it.

7 THE COURT: I appreciate that. I guess I kind of  
8 assumed that generally.

9 MR. TAIBLESON: Of course not.

10 THE COURT: Not to be a jerk, but what I was asking  
11 from a logistical standpoint if I were to order that, is that  
12 something that would take place in a relatively short period of  
13 time, or is that something that would take longer to achieve?

14 MR. TAIBLESON: I think it would be challenging to do  
15 it quickly, Your Honor. And because there is truly no evidence  
16 supporting any of the allegations at all as the defense  
17 acknowledges, I don't think that Your Honor should order that  
18 production.

19 THE COURT: I appreciate that. I was trying to get a  
20 sense of what the logistics would be if I were to do it. And  
21 when you say it wouldn't happen quickly, are you indicating it  
22 might be weeks, that it might be a number of days? Do you have  
23 a sense?

24 MR. PTASHKIN: Your Honor, I don't think we can give a  
25 precise timeline of how long it would take. But obviously

1 turning over a file of that nature involves coordination with  
2 the FBI General Counsel's Office. It certainly would not be an  
3 overnight --

4 THE COURT: No, I understand that.

5 MR. PTASHKIN: I don't think we can say right now  
6 sitting here whether it would be two weeks or two months. We'd  
7 have to research that after the hearing.

8 THE COURT: Okay. Thank you.

9 MR. ALBEE: Judge, can I make one comment?

10 THE COURT: Sure, Mr. Albee.

11 MR. ALBEE: So just to be clear about the informant  
12 file. We're, of course, concerned about what is in it. It's  
13 our understanding, and I think we've cited the sources for our  
14 understanding, that informants are supposed to initially be  
15 vetted as to their appropriateness and then be reviewed on a  
16 yearly basis.

17 THE COURT: Right.

18 MR. ALBEE: And of course identifying if they've  
19 violated instructions, violated the law, those kind of things.  
20 The informant, Mike, has had a number of run-ins with the law,  
21 including the one the Court referred to that is, you know,  
22 probably the most significant that we're aware of. And frankly,  
23 we think there's *Brady* material if those things are documented.  
24 We think it's *Brady* material if they are not documented. If for  
25 some reason the FBI who is going to sponsor this informant is

1 not identifying the wrongdoing or violations of instructions and  
2 other things, that's really problematic because the informant  
3 file is supposed to presumably be a way of accountability for  
4 the informant. And if they're bypassing that, that says  
5 something about their entire investigation and also the agents  
6 themselves.

7           And so we'd certainly encourage the Court to review  
8 that information in camera. The other thing I was going to  
9 mention is we had previously asked Judge Duffin and I think  
10 initially he indicated an openness to this and then it didn't  
11 happen, but we had requested an opportunity, as the Government  
12 has, when it comes to CIPA information to meet with the Court ex  
13 parte to explain why we think various things in the informant  
14 file, the payments, expenses, other benefits and other things  
15 that might be in there would be important to the defense so that  
16 we can give the Court the full view of the defense theory and  
17 why the informant, Mike, is not credible. And so we would again  
18 request that opportunity to explain our position ex parte to the  
19 Court.

20           THE COURT: Thank you. I'll think about that because  
21 I was not aware of that. I guess one question I do have,  
22 Mr. Albee, is some of the events that are described in your most  
23 recent filing, in fact I think all of the events that are  
24 described in your most recent filing, are events that post date  
25 what happened with Mr. Hamzeh, post date Mr. Hamzeh's

1 investigation. And one of the questions that I guess I had and,  
2 perhaps, this is something that you would consider addressing if  
3 you had this meeting. But let's say theoretically that law  
4 enforcement has an informant and that they conduct an  
5 investigation using that informant, and then three years later  
6 that informant goes out and commits arson. How is it impeaching  
7 of the informant to know about and to inquire into an event that  
8 took place two years after the time that the informant was  
9 involved in the investigation?

10 MR. ALBEE: Well, in general, I guess it's easier if I  
11 start with anything that has to do with credibility. He's still  
12 a witness at this trial, and it's whether he has any motive or  
13 bias, any reason to curry favor with the Government, any reason  
14 to shade the truth, any reason to pile on Mr. Hamzeh, any desire  
15 to continue to please the Government so that he may be eligible  
16 for future payments from the Government.

17 I mean, at least it was represented to us in November  
18 of 2017 that he was continuing to work as an informant, and so  
19 he has a continued desire as a Government employee to please the  
20 Government and to give testimony consistent with their theory of  
21 the case. Again, if there's misconduct that the Government  
22 turns a blind eye to, assists him with, tries to get him out of,  
23 then, you know, that also affects his bias and motive in the  
24 case as well as the agents and the integrity of the  
25 investigation; that they're willing to do that because of their

1 desire to convict Mr. Hamzeh in this case.

2 THE COURT: Well, like I said, I hope to get this  
3 discovery order out to you all shortly and for all categories.  
4 Except that particular one, my ruling will be in more detail on  
5 the record. My ruling will be that I don't find any clear  
6 errors in any of Judge Duffin's rulings in that regard.

7 Another issue I haven't gotten you a ruling on and,  
8 quite frankly, I think probably lends itself better to a ruling  
9 orally is the motion that the defense has filed seeking to  
10 conduct voir dire -- to have counsel conduct the voir dire at  
11 trial instead of me doing it.

12 I certainly understand the logic behind it. I read  
13 some of Judge Bennett's work, and I realize what the rationale  
14 is. I have a handful of concerns. One of my concerns is that  
15 we've got a lot to get through in this case, regardless of some  
16 of the rulings on the motions in limine. Picking a jury,  
17 obviously, is critical for Mr. Hamzeh as well as for the  
18 Government. I don't doubt that for a minute. But picking a  
19 jury is critical in almost every single case, if not every  
20 single case that we have, and I am concerned about the length of  
21 time.

22 Now, I realize the defense has represented that it has  
23 research that shows that attorney-conducted voir dire does not  
24 extend the amount of time that it takes to select a jury. To be  
25 honest, some of my experiences when I was a defense attorney in

1 state court practice demonstrated to the contrary, but I realize  
2 that may depend on the judge and may depend on the case and may  
3 depend on the attorneys, so I don't want to paint with too broad  
4 a brush. But I think it will be very important to, number one,  
5 conduct the voir dire efficiently. And number two, conduct it  
6 consistently.

7 One of the things that concerns me about the jury  
8 questionnaire questions and about the form in which some of the  
9 questions have been presented to me for voir dire to the jury  
10 itself is that many of the questions are sort of if so, why-type  
11 questions, open-ended type questions that invite kind of a  
12 discussion. I've not in many cases allowed questions like that.  
13 Because particularly if we end up with some 70 or 80 folks in  
14 here in the voir dire and say, you know, everybody raise your  
15 hand if you think that, you know, the Packers did really well  
16 last night. And, you know, nobody raises their hand. Okay, let  
17 me pick a different question. Everybody raise your hand if and  
18 57 people raise their hands, and then we go, okay, so why, and  
19 we have a discussion. It is going to be an extended -- This is  
20 going to take a while.

21 On the other hand I do understand, and I think it's  
22 probably true in some cases that jurors are more reluctant to  
23 look at somebody wearing a black dress who they believe would  
24 disapprove of them if they gave a particular answer and give  
25 that answer than they might to an attorney who even though they

1 should think that attorney would disapprove of them too,  
2 apparently has a less likelihood of believing that.

3           What I think is appropriate is that I will do the  
4 initial questioning. After I do the initial questioning, I'll  
5 follow my usual practice, which is to ask counsel to sidebar and  
6 discuss follow-up questions either of specific jurors based on  
7 answers they've given or of a category that you think has raised  
8 some concern. And then based on that sidebar, I will allow  
9 counsel on both sides to do follow-up questions that we discuss  
10 at sidebar.

11           I think that was sort of one of the proposals the  
12 defense hinted at was a combination of judge conducted and  
13 attorney-conducted voir dire. I think that allows the initial  
14 set of questions to be consistent and to make sure that they're  
15 asked in the same way, but it also gives you all an opportunity  
16 to follow up albeit in specific categories or with specific  
17 questions that we will talk about at sidebar. Mr. Ptashkin, do  
18 you have a question?

19           MR. PTASHKIN: I guess if the Court will continue  
20 talking about the process, I can wait. I guess a couple  
21 questions about the process. After we have the sidebar, is  
22 there going to be a time limit on the questions the parties are  
23 going to be able to ask the jury pool? And I guess our general  
24 concern is we've expressed in our briefing is if we don't know  
25 the questions the defendant's attorneys are going to ask the

1       jurors in advance, it's concerning to us because we don't want  
2       to have to object repeatedly to questions that are asked to the  
3       jury pool. So I guess my -- our question is specifically what's  
4       the procedure going to be based on the sidebar discussion? Is  
5       there then going to be a list of questions produced that the  
6       parties can ask or is it going to be here is a general category  
7       of questions that can be asked to the jury pool, have at it for  
8       ten minutes each with whatever questions that fall under that  
9       broad category you want to ask?

10           THE COURT: I have not discussed whether or not there  
11       will be a time limit on it because I don't know. We can get to  
12       sidebar and somebody could say, I have two questions for Juror  
13       No. 14, and that's it in which case I don't see any reason to  
14       put a time limit on anybody. If we get to sidebar and somebody  
15       says, I have the following 87 questions that I would like to ask  
16       that we haven't covered, number one, I'm probably going to say  
17       no. And number two, at that point, I guess I would consider a  
18       time limit. What I had attempted to describe a moment ago as  
19       the procedure is that I had anticipated that at sidebar, we  
20       would discuss if someone wanted to say you know Judge, based on  
21       answers we just got, I would like to ask these questions. And I  
22       would either say sure or no, I don't think that's appropriate.  
23       So while I understand that doing it that way may mean, for  
24       example that you, Mr. Ptashkin says, Judge, I would like to ask  
25       is there anyone here who has very strong feelings about machine

1 guns not ever being sold ever. And then when you got up in  
2 front of the jury and actually ask the question and say, do any  
3 of you have really strong feelings about the fact that no one  
4 should be allowed to sell machine guns? Okay, you asked a  
5 different question technically than what you asked at sidebar,  
6 but I think it's generally the same question, so I'm not going  
7 to have an eruption over it, and I would like to hope nobody  
8 else will have an eruption over it.

9           I think I trust all of you that if we discuss at  
10 sidebar what the question generally will be, that you will turn  
11 around and that's the question you will generally ask, so I'm  
12 not going to sit here right now and say each person gets ten  
13 minutes. I think we need to see what happens. This will have  
14 to be a little bit of a fluid situation, but I don't anticipate  
15 people will walk away from the sidebar not knowing what's going  
16 to happen next. Does that answer that question?

17           MR. PTASHKIN: Yes, Your Honor.

18           THE COURT: Any question from the defense about that  
19 particular issue?

20           MR. ALBEE: About the sidebar and the follow-up  
21 questions?

22           THE COURT: The procedure generally for voir dire.

23           MR. ALBEE: No Judge. The one slight thing, and I  
24 don't know, I hope I'm not jumping the gun on this, but we'll  
25 get the questionnaire back. That might lead to some obvious

1 questions at that time. I don't know if the Court was going to  
2 get them. We might get them, there is some opinion expressed by  
3 a juror where somebody will say, we have to follow up or you  
4 know, I don't know if the Court was addressing that.

5 THE COURT: No. Thank you because one of the things I  
6 had thought about in this context was you had suggested it  
7 earlier at the last hearing, Mr. Albee, that we might want to  
8 have this kind of interim hearing that we've got a week ahead of  
9 trial or whatever. I am hoping that you will all have gotten,  
10 at least, a good chunk of the jury questionnaires back by that  
11 time, and perhaps we can fine tune voir dire at that point. If  
12 we get questions back that everybody goes oh, there's a theme  
13 here, and there's something that we need to address, that will  
14 be a place that we can build in some of that is what I am  
15 hoping, assuming that we get a critical mass of the  
16 questionnaires back prior to that hearing. Anymore questions  
17 about that? The general procedure then is I'll ask the initial  
18 questions. We will confer, and then I will allow you to ask  
19 follow ups based on questions we've agreed to at sidebar.

20 Okay. A couple of easy housekeeping things to take  
21 care of. You all have requested a court reporter.  
22 Ms. Armbruster is here today not because we needed necessarily  
23 to have a court reporter for the final pretrial, but she is  
24 going to be one of our court reporters I think. I think you are  
25 going to try to tag team so nobody's hands fall off, so we will

1 have a court reporter. You can rest assured that that's taken  
2 care of.

3 You all I appreciate it, came up with a brief recount  
4 of what you'd like to tell the jury in terms of what the charges  
5 are. That's in your pretrial report, and I will do that.

6 The pretrial report indicates that you all anticipate  
7 the trial will take two weeks, if the defense is allowed to  
8 present the entrapment defense. I ruled on that. So what I  
9 plan to tell the jury in the opening or the preliminary  
10 instructions, and we also told them I think in the questionnaire  
11 is that it will take, approximately, two weeks, so we'll use  
12 that estimate.

13 At the time you filed the pretrial report, you  
14 anticipated or you didn't have any stipulations. I know that  
15 you have just recently filed the one, which I have buried here  
16 somewhere under all my stacks, is Docket No. 299, and it  
17 indicates that there are a number of the recordings that you all  
18 have agreed on in terms of authenticity. I appreciate that. I  
19 will come back to that in a minute in terms of some of the  
20 motions in limine.

21 I got the witness list. I understand that you all  
22 have agreed that you're not going to necessarily list the  
23 occupation or not advise the jury of the occupation or the city  
24 of residence of a witness. I know the reasons for that. I  
25 think we should all probably just have a head's up though that,

1 obviously, the reason we tell folks who the witnesses are going  
2 to be is to figure out if anyone knows them. So we may have to  
3 figure out or be a little thoughtful about flexibility in that  
4 way. If somebody says, well, that name sounds familiar to me,  
5 is there something else you can tell me about that person so I  
6 can figure out if it is my Joe Smith or somebody else's Joe  
7 Smith? I assume we can figure that out if somebody says I think  
8 I know that person. We will cross that bridge when we get to  
9 it.

10 I found the list of potential witnesses daunting, but  
11 I assume as is usually the course, you all have listed every  
12 possible witness, including people who may not be called. I did  
13 note there is a lot of duplication, that the defense anticipates  
14 will call a number of witnesses that are on the Government's  
15 witness list, so I presume that that will probably get worked  
16 down a little bit.

17 I'll come back to expert witnesses when we're talking  
18 about motions in limine. I know there are some issues there.  
19 You all have got your exhibit lists. The only thing I would ask  
20 is that if those change in the next few weeks, which they may as  
21 you're fine tuning and prepping, if we could just get even a few  
22 days before trial, if we could get a finalized exhibit list for  
23 each of you for trial purposes, we're all working with that same  
24 document. And a trial like this where we'll have a number of  
25 pieces of evidence coming in, I'm going to be asking you all and

1 my staff to double check and make sure that we're keeping up  
2 with every single document that's introduced or items,  
3 everything that gets admitted so we can double check against  
4 each other and have a record of what came in and what didn't  
5 come in. I think a finalized exhibit list will be really  
6 helpful for all of us in that regard.

7 MR. ALBEE: Judge, I presume on that score, you  
8 wouldn't want us to be turning in one every two days. Maybe we  
9 can shoot for turning in the next one the day before the next  
10 final pretrial conference.

11 THE COURT: Actually what I said is as long as I have  
12 a final a couple days before trial, that will work for my  
13 purposes, I think. But if you kind of think okay we're settled  
14 in or we think we're settled in before that next conference,  
15 that's fine.

16 MR. TAIBLESON: I think we'd like to shoot for that  
17 too, Your Honor.

18 THE COURT: For my purposes if we've got a couple days  
19 before trial what we kind of know is most likely the final list,  
20 I want us to be able to have something to go off of during  
21 trial.

22 I'm not going to discuss jury instructions today.  
23 Obviously, this is going to be a trial in which how those  
24 instructions unfold is going to matter. I do know that the  
25 defense has raised some questions about my normal kind of

1 preliminary instruction script that I use in other trials. I've  
2 started to take a look at those issues. I realize that there  
3 are some modifications you all are asking for, and I'll be  
4 looking at those, and we can talk about those as we get a little  
5 bit closer to the second conference.

6 Two alternate jurors, I think, that is more than  
7 appropriate, so we'll plan on 14. I think we've already let the  
8 jury coordinator know that they will have 14, and we are looking  
9 at a two-week trial. If we get somewhere around 70 people or so  
10 or whatever we end up with, we will have a sizable venire to  
11 cover that time period and that number of folks.

12 With regard to motions in limine, one of the first  
13 questions I wanted to ask you all is as you know, the Government  
14 has presented a list all of the records that it's going to be  
15 seeking to utilize, and the defense filed some objections. Some  
16 of them are kind of to categories of conversations. Some of  
17 them are to specific recordings, and some of them are to  
18 recordings with modifiers or qualifiers or however you want to  
19 put it.

20 So I guess one question that I'd ask just from a  
21 broad -- I have not worked my way through all of those yet and  
22 will continue to do that. But from a broad picture standard,  
23 one of the questions that I had is whether or not the stip that  
24 you all filed today which is to authenticity, I'm assuming that  
25 that doesn't necessarily affect people's objections as to

1 admissibility. But if any of these stipps do and there's some of  
2 this I don't need to consider, that would be interesting to  
3 know. From the Government's standpoint.

4 MR. TAIBLESON: My understanding, Your Honor, the  
5 defense has not stipulated to the admissibility of our  
6 statements via the stipulation nor have we to them.

7 THE COURT: Is that correct?

8 MR. TAIBLESON: Unless I'm mistaken.

9 MR. ALBEE: Unfortunately, that's accurate.

10 THE COURT: I will not give you a ruling on that  
11 today, but I will continue plodding through that. To that end  
12 though, I did want to ask a practical question. I think all of  
13 you know that I strongly encourage people ahead of trial to make  
14 an appointment with Ms. Wrobel to come in here on a day when we  
15 don't have anything going on and look at all the equipment, try  
16 your stuff out on the equipment. Make sure that it's set up the  
17 way that you want it to be and it operates, at least, when  
18 you're in here practicing with it.

19 One of the questions that I have for the Government,  
20 and I suppose the defense as well, is how do you all intend to  
21 present the recorded conversations to the jury? I don't mean  
22 technically, you know, how do you plan to push play. Are you  
23 going to have a note book? Is it going to have English and  
24 Arabic columns? How is that going to work?

25 MR. PTASHKIN: Your Honor, basically our procedure,

1 what we intend to do if it's okay with the Court, we're going to  
2 play the oral recorded statements, which are in Arabic, to the  
3 whole courtroom. And on the jury screen, they will see  
4 synced-up English transcripts for our exhibits. So and as we  
5 discussed in one of our filings, we want to admit the English  
6 transcripts, which are translations of the Arabic recordings  
7 into evidence. Because in this case, I think the recordings by  
8 themselves are going to be pretty worthless in the jury room  
9 given I think it's fair to assume there won't be many Arabic  
10 speakers on the jury. We intend to play the oral recordings  
11 with the transcripts of our exhibits synced up, so the jury is  
12 reading the English as the Arabic is being played for our  
13 exhibits.

14 THE COURT: And you plan to show the English  
15 translations electronically? But you mentioned, Mr. Ptashkin,  
16 usefulness or uselessness in the jury room. Are you planning to  
17 have a paper copy for them in the jury room?

18 MR. PTASHKIN: We have no problem printing out the  
19 English translations of the recordings and providing a binder of  
20 our exhibits that are admitted into evidence to the jurors in  
21 the jury room.

22 THE COURT: Mr. Albee, I know that there's some  
23 dispute that the defense has with some of the translations. How  
24 is the defense planning to proceed?

25 MR. BUGNI: Your Honor, we don't have any disputes.

1 We've been able to work out with the Government as far as the  
2 exact words, so we have no dispute. We, in fact -- I hope the  
3 Government will correct me if I'm wrong. We hope to have  
4 another stipulation filed next week as to the accuracy of all  
5 the transcripts.

6 THE COURT: Okay. Can I just ask, Mr. Bugni, one of  
7 the experts I know that you all are offering is an expert in  
8 Arabic-English translation. So is the issue more going to be on  
9 how the word inferences or context?

10 MR. BUGNI: It could be. Sorry, Your Honor. As it  
11 stands, we don't think we'll need him let's say if Mike were to  
12 say that's not what I said or that's not what it means.

13 THE COURT: I see, I see. Okay, thank you. That  
14 helps tremendously. Thank you very much. So everybody is on  
15 the same page then in terms of how the audio recordings and the  
16 visuals will be presented then?

17 MR. BUGNI: We have not made a final decision on how  
18 we're going to present ours, Your Honor. Part of it is, we've  
19 noticed a lot of transcripts, and those go to the context of  
20 what the Government might put in. If they want Page 8 through  
21 10, you have to understand what's being said from Page 2, the  
22 reference earlier.

23 If the Court grants the motion in limine, 8 threw 10  
24 doesn't need to come in. We don't need Page 2, either. We're  
25 sort of playing catch up on what's going to happen there.

1           THE COURT: I see. Okay, thank you. Mr. Ptashkin.

2           MR. PTASHKIN: I guess briefly we agree with  
3 Mr. Bugni. I anticipate there will be a stipulation to the  
4 accuracy of the English language transcripts soon. Of course,  
5 that's different than whether they are admissible or not, even  
6 though we are agreeing they are authentic and accurate  
7 translations. And I guess this has already been said but just  
8 to nail it on the head, we've already provided the defense with  
9 the precise clips from the recordings that we're going to use,  
10 and those are our exhibits. We're not going to be offering in  
11 the full recordings, all of the recordings into evidence. We're  
12 just going to be offering the clips we want to use as exhibits  
13 into evidence.

14           So the stipulation I hope wasn't too confusing. But  
15 just to highlight, US Exhibits 100 through 159, those are the  
16 exhibits we're going to offer into evidence. Those are the  
17 clips. Exhibits 500 through 530 we added to the stipulation.  
18 They weren't on our original exhibit list. Because in talking  
19 with Mr. Bugni, we thought it made sense to just authenticate  
20 the entire full-length recordings so that whatever clips each  
21 party wants to use that are deemed admissible were then  
22 authenticated to avoid an authentication. I thought that might  
23 be a little confusing, so I wanted to clarify.

24           THE COURT: I appreciate that. So if we get objection  
25 at trial to any recording, it should not be on authenticity

1 grounds, it should be on some other evidentiary basis?

2 MR. PTASHKIN: Correct.

3 MR. ALBEE: Judge, I'm just worried a couple issues  
4 might be overlooked. As Mr. Bugni seemed to indicate, while  
5 they've identified certain experts, the rule of completeness, in  
6 our view, might require those to come in at the same time. It's  
7 not that we supplement it later. The jury needs the context  
8 immediately to understand it at the time it's presented. That's  
9 one of the evidentiary issues that's going on.

10 Then, it's my understanding as to, you know, we're  
11 also providing -- I think have provided a disk today to the  
12 Government with excerpts that we intend to put in. And my  
13 understanding is that those are sort of admissible subject to  
14 the Court's ruling on them. In a number of instances, as the  
15 Court knows, they've suggested that it's inadmissible hearsay to  
16 put in Mr. Hamzeh's statements.

17 My understanding is that if the Court were to rule no,  
18 that's admissible as to state of mind or not offered for its  
19 truth, whatever it is, that those will go in. And then as  
20 Mr. Bugni indicated, we're still in the process of deciding how  
21 we'll present these to -- Once we admit those, some of them we  
22 may deal with in cross examination. Some we may deal with in  
23 closing argument. And others we may try to play as the  
24 Government is or maybe in a different form.

25 THE COURT: So let me ask, that reminds me of another

1 question I wanted to ask. I appreciate that, Mr. Albee.  
2 Without getting too much into the weeds about how digitally you  
3 all are organizing these clips, one of the things that I think  
4 is in all of our best interest to avoid, obviously, is a  
5 situation in which an issue comes up and either of you want to  
6 play something in cross or in rebuttal. Or in other words, it's  
7 not part of your standard presentation in your direct. Have you  
8 all come up with some mindful way to ensure that if on the fly  
9 you need to pull up the conversation from November 29th at  
10 10 o'clock that, number two, we're not going to be sitting here  
11 with the jurors taking a 45 minute water break while we try to  
12 figure out where that is?

13 MR. PTASHKIN: Your Honor, I think this gets to the  
14 broader issue of the admissibility of Mr. Hamzeh's out-of-court  
15 statements when presented by the defendant. Because I mean, our  
16 exhibits we think are all extremely relevant and admissible  
17 exhibits.

18 THE COURT: I hope so.

19 MR. PTASHKIN: As we briefed, we don't think the  
20 defendant should be able to put in his out-of-court statements.  
21 So it's going to be extremely difficult to create these exhibits  
22 if we don't know in advance what the exhibits are going to be  
23 that the defendant's going to use. Because again, we're dealing  
24 with Arabic recordings that have been translated. And to sync  
25 them up is a fairly time-consuming process. Because we need the

1 Arabic translator sitting next to the person that's cutting the  
2 Arabic audio and saying, okay, stop here, stop there to create  
3 that recording where the exhibit needs to be. So if we're doing  
4 that on the fly where we're deciding what is needed under the  
5 rule of completeness on the fly, just being honest, it will be  
6 physically impossible to create the clipped recordings on the  
7 fly in court.

8 THE COURT: So one of the concerns that I have,  
9 though, is that you all have basically argued, Mr. Ptashkin,  
10 that any of Mr. Hamzeh's statement that Mr. Hamzeh may try to  
11 put in are hearsay.

12 MR. PTASHKIN: Yes.

13 THE COURT: Well, the problem with that is that we  
14 have a rule that takes up six pages of the Federal Rules of  
15 Evidence that lists all the exceptions to hearsay, and it's  
16 almost impossible for me to say as a blanket ruling that  
17 anything that Mr. Hamzeh might want to put in is hearsay because  
18 he might want to put in some of it to show state of mind. Some  
19 of it may fall under certain exceptions. One of the motions in  
20 limine that I don't think I can rule on today is to say, you're  
21 right, all Mr. Hamzeh's statement, if he seeks to put them in,  
22 are hearsay because I don't know what he might want to put in  
23 any particular statement in for.

24 MR. TAIBLESON: And Judge, I guess our request is that  
25 if it's at all possible for the defense to identify with

1        particularity which statement they seek to admit and then for  
2        Your Honor to rule in advance of trial whether they are  
3        admissible, that might allow us to deal with these issues ahead  
4        of time. But if it's left to the trial as a logistical matter,  
5        I think it's going to be a nightmare.

6              So one way we try to do our part in this is by  
7        identifying exactly what we seek to use. We're just trying to  
8        get out in front of this and make it as humane as possible once  
9        it's time to actually do that.

10             THE COURT: I appreciate you all identifying. Despite  
11        being flabbergasted by the thickness of it, I appreciate the  
12        fact that you all have provided that. And I don't know,  
13        Mr. Albee and Mr. Bugni, if you all are planning to present  
14        something similar.

15             MR. BUGNI: Three things, Your Honor. One answer to  
16        your initial question, I think we'll be able to work that out as  
17        far as the presentation and not having problems beforehand given  
18        that we've both identified the specific portions that we want.  
19        What happened, Your Honor, if I could take 15 seconds, is we  
20        originally had a Bates number page system that we could all use.  
21        The Government has a very good system where they came up with  
22        the line numbers that made objections very precise. That then  
23        took away the Bate system. So when we identified everything on  
24        our transcripts that we put on the exhibit list, it was all Page  
25        8, Page 4, whatever it was.

1           THE COURT: I had a question about that. It didn't  
2 seem to match up.

3           MR. BUGNI: That's right. So what we've spent over  
4 the last week was weaving, really me, going through everything  
5 again to then match it up perfectly to the transcript pages, and  
6 we've turned that over to the Government I think today. We were  
7 working all day yesterday and the day before, so I don't think  
8 there will be a problem at all as far as what we're trying to  
9 admit and what we need to.

10          To the third point, Your Honor, I think most of this  
11 will come in in cross examination or refreshing recollection.  
12 It's not so much as your -- The transcript says what it says.  
13 The transcript is accurate. Was this what you said? Was it a  
14 revolver? Was it a handgun? Whatever it is. It's not then we  
15 need to play the Arabic form. We all agree it's accurate. We  
16 all agree that it's authentic. That's the point we're trying to  
17 make. A lot of the headaches won't come to fruition. We'll do  
18 everything we can to guard against those.

19          THE COURT: I appreciate that from both of you. Maybe  
20 what is getting exchanged today will move us forward toward  
21 everybody feeling a little more comfortable with that when we  
22 next get together. Okay. Thank you.

23          I wanted to go through a few of the motions in limine  
24 if you all will bear with me for just a second. I've already  
25 ruled on the request for attorney-conducted voir dire, which was

1 discussed in Docket Nos. 257, 269 and 280. You all will know  
2 what I am proposing to do now. Docket Nos. 272, 277 and 271 --  
3 291, sorry, had to do with authentication. It looks like  
4 today's stipulation, at least, deals with some of that.

5           The Government moved in Docket No. 272, I believe, to  
6 be able to admit Mr. Hamzeh's statements as statements of a  
7 party opponent. I think, for the most part, they do fall into  
8 that category, and again I'm going to be going through that  
9 chart and looking at specific objections that the defense has,  
10 and I'll get back to you on those.

11           Same thing with the Government's request to preclude  
12 the defense from introducing Mr. Hamzeh's statement. As I  
13 indicated, that's really going to have to depend on what  
14 statements they want to put in and for what purpose. I will  
15 defer ruling on that.

16           The Government's request to preclude the defense from  
17 soliciting testimony or introducing transcripts of Mike and  
18 Steve's comments, I think again, I can't really rule on that  
19 until I know what -- I know that they're not admissions of a  
20 party opponent. I agree with that because those two gentlemen  
21 aren't parties. But in terms of an exception to the hearsay  
22 rule, there is no way I can know that until I know what the  
23 defense wants to bring the statement in for, and so that one is  
24 going to have to be, unfortunately again, something that I see  
25 as I see what the purpose is for the admission.

1           MR. TAIBLESON: Judge, I hate to interrupt you. Do  
2 you mean to say that you will do that at trial, or is that  
3 something you are asking the defense to do pretrial so you can  
4 rule pretrial?

5           THE COURT: I guess I don't know if that is part of  
6 what you all are going to identify ahead of time. Mr. Bugni,  
7 what part of Steve and Mike's statements you might be looking to  
8 admit?

9           MR. BUGNI: Sorry, Your Honor. We will bring in their  
10 effect on him, like Steve saying hey machine gun, machine gun,  
11 machine gun. We're going to bring those in. We're seeking to  
12 admit those as, you know, what the influence they have upon  
13 Sammy. Were intending to bring those in. We've identified  
14 portions. We're not asking for a single sentence to be brought  
15 in, but two pages, here you go, here is Sammy saying, no, I just  
16 want a handgun. How about a machine gun?

17           THE COURT: When you say you identified, Mr. Bugni,  
18 forgive me from sounding really ignorant, but have you  
19 identified them in the pleadings you filed here or have you  
20 identified them to the Government, and you're going to be --

21           MR. BUGNI: They are in the exhibit list, so all the  
22 transcripts to the page number. And today we gave them an  
23 updated one with the exact excerpts, and the Court -- Your  
24 Honor, once we kind of go back and forth, we'll give you -- If  
25 you want the updated one, we can file that today as well.

1           THE COURT: I think that might be helpful. Again,  
2 we're trying to avoid a situation where in the middle of trial  
3 you want to bring something in and the Government says, wait,  
4 wait, wait. If I can get a copy of it, that will be great.

5           MR. BUGNI: I will get it filed, Your Honor.

6           THE COURT: Thank you very much. The Government asked  
7 for reciprocal discovery deadline for the Rule 16(b) and 16(d)  
8 information. And the defense response was that it knows that  
9 it's got to comply with Rule 16. It has turned everything over  
10 it plans to use. I'm not sure, does the Government have some  
11 view there's something that you don't have?

12          MR. TAIBLESON: No. Your Honor, our position  
13 essentially is that if the defense is -- intends not to produce  
14 witness statements in its possession for its witnesses until  
15 after the witness has testified, they should tell the parties  
16 now. And we ask the Court to order the defense to turn them  
17 over, at least, a little bit earlier so that the jury doesn't  
18 need to recess after every defense witness. This case has been  
19 going on for several years, so it seems very likely they will  
20 have witness statements in their possession. And just for  
21 purposes of ordering -- an orderly trial, we would like to avoid  
22 a situation where statements are not given before trial.

23          MR. ALBEE: Judge, the issue is what is a witness  
24 statement? And I don't believe we have any witness statements.  
25 If we do, we will produce them. If it's work product if we take

1 notes of a witness' interview, if we don't have the witness  
2 adopt those statements or record them in some verbatim fashion,  
3 then they don't qualify as witness statements, so they won't be  
4 produced because they are work product.

5 THE COURT: So are you indicating then that whatever  
6 memorialized information you may have from a witness is your  
7 notes, you all's notes or investigator's notes, and not sort of  
8 what we think of as a formal witness statement?

9 MR. ALBEE: Just to be clear, I'm not trying to evade  
10 the Court's question. They wouldn't be a witness writing down  
11 on October 10th, I, you know, approached Mike and blah, blah,  
12 blah signed. We don't have something like that that I'm aware  
13 of, and we will certainly produce it if we do. Otherwise, it  
14 will be investigator notes or memos to the attorney or attorney  
15 notes.

16 THE COURT: Which is work product. You wouldn't be  
17 entitled to those. I think the defense is aware of its on-going  
18 obligation if it does have something of that nature. In other  
19 words, a witness who has sat down and signed a statement or  
20 someone who is not part of the defense team who has taken a  
21 statement from a witness, they have an obligation to turn those  
22 over. And I agree with Mr. Taibbleson, I prefer those get turned  
23 over before trial, so I'll just remind you of that obligation.

24 MR. ALBEE: Thank you.

25 THE COURT: The Government asked to exclude argument

1 or questioning relating to its decision to charge Hamzeh with  
2 the machine guns rather than any crime that could be arguably  
3 defined as a terrorism crime. Defense said they will not be  
4 making arguments in that respect, so I will grant that motion.  
5 That is at Docket Nos. 276 and 291.

6                 The Government has asked to exclude evidence and  
7 argument from the defense regarding the Government's motives for  
8 prosecuting the case, the informant's motivations for  
9 investigating, agent's mental state. The Government argues that  
10 this is extraneous or collateral. I think this is one of those  
11 that there are bits and pieces that could fall into other  
12 categories or different categories.

13                 I think there is sufficient basis for the Government  
14 to -- the defense to ask questions about this period when there  
15 was not recording going on. I think the defense has more than  
16 enough or more than sufficient basis to question Mike's  
17 credibility and to the extent Steve's credibility, and so  
18 motivation goes to that. If people are getting paid and that's  
19 a reason for them to, perhaps, say things that they wouldn't  
20 otherwise say. If people are getting other sorts of benefits  
21 other than money, and there's a reason for them to say something  
22 that they wouldn't otherwise say, that's just purely  
23 credibility.

24                 I think the defense absolutely has the ability to get  
25 into that. The defense has admitted that it knows that it can't

1 solicit evidence that the Government somehow asked the  
2 informants to entrap Mr. Hamzeh. They've acknowledged that they  
3 can't get into that. But in terms of questioning the  
4 credibility of any witness, I think that's appropriate.

5 Now, as to the Government's motivation in prosecuting  
6 the case, that may be closer to whether or not they can ask  
7 about the Government's solicitation to entrap. But any witness,  
8 I think, is subject to questions on cross examination.

9 Now, obviously, if any of you think that someone's  
10 being asked questions that go beyond credibility questions and  
11 motivation questions, I will except those objections, and we'll  
12 deal with them at trial.

13 MR. TAIBLESON: Your Honor, may I flag one issue on  
14 that?

15 THE COURT: Sure.

16 MR. TAIBLESON: One line of questioning and argument  
17 that the Government believes is inappropriate is to quote the  
18 defense's motion, "the resources poured into the case meant that  
19 there was pressure to get Hamzeh to commit a crime, such as  
20 getting a machine gun". As the defense acknowledges, "the  
21 Government's intent to entrap the defendant is irrelevant to  
22 prove entrapment".

23 So any line of argument indicating that the Government  
24 had to entrap Hamzeh because they spent a lot of time and effort  
25 to investigate him is under their own correct reading of the law

1 totally impermissible, and so I want to flag that now.

2           If Your Honor feels that Your Honor can't rule now in  
3 advance of questions, I understand that, but I think that's  
4 enormously important as to the legal issue that can be put to  
5 the jury.

6           THE COURT: And what I would say to that,  
7 Mr. Taibleson, is that there's in my mind a thin line and maybe  
8 a blurry one between saying you guys put a lot of work into this  
9 case, you put a lot of money into that case, it was important  
10 for you to, you know, be able to get something out of this case.  
11 I think that's a valid line of questioning. I realize that that  
12 can teeter into and so you know if you couldn't prove a crime,  
13 you needed to get him to commit one.

14           Now, we're clearly in entrapment territory, and it's  
15 inappropriate questioning. I think the reason I can't say  
16 absolutely is because I don't know what the question will be  
17 like. I think if there's a question in terms of you had a lot  
18 invested here, it was important to you, you needed this  
19 investigation to turn out well, so to speak. I think that's a  
20 valid line of questioning. And where the line gets crossed is  
21 going to depend on how the question is asked.

22           MR. TAIBLESON: Thank you, Judge.

23           THE COURT: The Government asked to exclude any  
24 argument or line of questioning that would interject issues of  
25 race or religion into the trial. I note the actual heading of

1 the motion in limine refers to arguments or questioning implying  
2 that the investigation or the prosecution of the case was  
3 racially or religiously motivated. So in other words, that  
4 either the investigating agency chose to investigate the case  
5 because of religious or racial biases, or that I suppose an  
6 agent of the investigating agency, that being an informant, made  
7 a decision in that regard.

8                 The defense responded not that they necessarily  
9 disagreed, but the objection was overbroad. There's a  
10 difference between saying the FBI decided to investigate  
11 Mr. Hamzeh because they were prejudiced against him based on his  
12 race or religion and saying, you know, does Mr. Hamzeh's either  
13 ethnicity or Mr. Hamzeh's own religious beliefs play into some  
14 of what was going on here and some of what you're going to hear?  
15 I think that's a valid distinction.

16                 I agree that arguments accusing the Government of  
17 choosing to bring this case because of racial or religious bias  
18 are inappropriate. I don't necessarily read the defense's  
19 remarks to say that they're going to argue that. But I don't  
20 think there's any way to completely separate out. The jury is  
21 going to hear people talking about Islam. They are going to  
22 hear people talking about Muslims. They are going to hear  
23 people talking about Masons, so it's a little bit hard to issue  
24 a ruling saying you can't ask any questions about race, neither  
25 of you. You can't ask any questions about religion when

1 necessarily there are going to be some of those questions.

2 So to the extent that the motion goes to prohibiting  
3 an argument that the investigation was motivated by improper  
4 reasons, I agree with that, and I will grant the motion to that  
5 extent.

6 The more subtle question in terms of the realities of  
7 the religious discussions that the jury will hear, I think  
8 that's got to kind of -- has to be a more case by case.

9 The Government asked to preclude counsel, I assume  
10 defense counsel, from demanding discovery, commenting on  
11 discovery, things of that nature during trial. I think it's a  
12 very common motion. And so to the extent that the motion says,  
13 you know, we don't make discovery arguments in front of the jury  
14 and we don't say, you know, I asked you for those, and you  
15 didn't turn them over, I agree with that.

16 The defense responded that said, you know, somebody  
17 pops up in court and says there were five conversations that  
18 took place on Thursday, November 15th. I remember there were  
19 five conversations, and the defense might want to respond by  
20 saying, really, are there notes of that? This is the first I  
21 heard, do you have notes of that? Those are kind of common  
22 questions, and I think those are appropriate.

23 If there's a discussion that we need to get into at  
24 sidebar if the next question is going to be Judge, he just said  
25 he had notes and we've heard nothing about this, that needs to

1 happen at sidebar, and I would prefer that that goes for  
2 everybody. If there are issues that come up and you all want to  
3 discuss the fact that you just heard something you've never  
4 heard before and you've gotten no documentation to verify, it  
5 should have been turned over in discovery, I ask that whoever  
6 discovers they have that problem request a sidebar, and we'll  
7 deal with that outside the hearing of the jury.

8 And to that end if I could just make a general  
9 comment. I don't think any of you have had a trial in front of  
10 me yet. You did, Mr. Taibbleson, that's right. You know this.  
11 To the extent that any of you have objections based on pretty  
12 straightforward one and two word, objection hearsay, lack of  
13 foundation, objection, asked and answered, any of these standard  
14 objections, feel free to make them, and I will rule on them. If  
15 there's argument that you need to make in connection with an  
16 objection even though it's cumbersome, I would ask that we do  
17 that at sidebar. I don't think those discussions ought to be  
18 had in front of a jury.

19 So if I perceive that someone says objection, Your  
20 Honor, we talked about this before trial, and one of the things  
21 that -- I'm going to cut you off, and I'm going to ask that we  
22 come over to sidebar. I know it's cumbersome and particularly  
23 sort of fraught issues. We can make several journeys back and  
24 forth, and I apologize to you for that. But the jury doesn't  
25 need to be involved in those discussions.

1           So quick typical Federal Rule of Evidence objections I  
2 will rule on without having to go to sidebar. Beyond that, we  
3 need to talk.

4           The Government has asked to limit cross examination  
5 regarding bad acts to only acts that are probative of  
6 truthfulness. And so they argue that, for example, if the  
7 defense has evidence that Mike seems to be getting -- seems to  
8 have an awful lot of money, that there doesn't seem to be any  
9 explanation for where he's getting that money from and the  
10 defense thinks that, perhaps, Mike is involved in drug dealing  
11 or some other illegal activity, past arrests, things of that  
12 nature, that the defense should not be allowed to cross-examine  
13 that.

14          As to prior convictions, the defense has acknowledged  
15 that it can't ask about the facts of those prior convictions.  
16 But whether or not the witness was truthful about the conviction  
17 or about the offense of conviction goes to credibility, and I  
18 agree with that. I think that's correct. It's a thin line, so  
19 obviously I would expect an objection if I thought if someone  
20 thinks they were going over that line.

21          But questions as to credibility and fruitfulness, I  
22 think, are relevant. And I also think that the Government --  
23 defense is correct. Sorry, I keep -- the defense is correct  
24 that some of those questions may go to bias or motive. For  
25 example, if there is -- If the defense has a good faith reason

1 to believe that Hamzeh was involved in illegal activity and  
2 believes and has reason to believe that because of that witness'  
3 assistance to the Government, that person is going to be helped  
4 out of that situation, and that person has -- and I realize,  
5 Mr. Taibleson, we've already talked about this, and you've  
6 indicated the CI file has no evidence to that effect. That's  
7 fine. I'm simply giving an example that if that evidence might  
8 tend to indicate that the witness has a motive to be less than  
9 truthful or to baffle or to create evidence, that will be a  
10 relevant line of inquiry.

11 It really is going to have to depend on what the  
12 good-faith basis is for asking the question and what the  
13 specific question is. So again, this is one that while I'm not  
14 trying to blow you all off, it is going to depend a lot on the  
15 context of the question and what's put forward as the good-faith  
16 basis for asking the question.

17 The Government made a jury nullification motion, which  
18 I expected they would do. And the defense has, as it does in  
19 most cases, acknowledges that it cannot and will not attempt to  
20 argue jury nullification, so I appreciate that. I assume that  
21 everybody is going to comport with that.

22 However, I think that I agree with the defense that  
23 the Government's view of what constitutes nullification is  
24 awfully broad. Much of what the Government has identified in  
25 its motion seems to me to be standard background information

1       that a defendant has a right to present in introducing himself  
2       to a jury and in letting a jury know who he is.

3                   So if the defense has evidence that Mr. Hamzeh  
4       financially supported his family and was close to his family and  
5       he's got pictures of him socializing with other people, I don't  
6       know if that is the kind of evidence they will put that in, but  
7       I don't see that as nullification evidence. That is simply  
8       evidence of the defendant letting the jury know who he is.

9                   In particular, the Government says that I should not  
10      allow Mr. Hamzeh to put in evidence that, "makes him appear like  
11      a normal American man devoid of a plan to commit a mass murder".  
12      I find that a particularly surprising request. Mr. Hamzeh is a  
13      criminal defendant defending himself against charges that he  
14      argues that he didn't commit. Of course, he's going to present  
15      himself as someone who didn't do what the Government alleges  
16      that he did, and so I'm a little mystified by what the focus is  
17      here. Maybe I'm missing something, Mr. Taibleson.

18                  MR. TAIBLESON: Your Honor, our position is just that  
19      family photos, discussion of him supporting his family that any  
20      person could produce who is predisposed or not predisposed to  
21      commit the offense or didn't commit the offense is not probative  
22      of the elements of the offense or the elements of the entrapment  
23      defense. Because any family photo -- Any person no matter how  
24      guilty can produce a familiarly photo. It's simply not  
25      probative.

1           If Your Honor -- We defer to Your Honor's ruling, of  
2 course, that Mr. Hamzeh wants to put in sort of background  
3 information about himself he may do so I guess to introduce  
4 himself, but we don't think that an extended discussion of  
5 supporting his family really has anything to do with the jury's  
6 charge here, which is to see how the facts apply to the elements  
7 of the offense. That's what we went to express. Maybe we  
8 didn't do a very good job of that.

9           THE COURT: I'm certainly going to give Mr. Hamzeh  
10 some leeway in introducing himself to the jury and telling  
11 himself to the jury. The Government, of course, has the right  
12 to argue, hey, the fact that you support your family means you  
13 are or are not predisposed to commit a crime. I leave to you  
14 all that argument. I don't see this as going to jury  
15 nullification. I see this as a defendant simply wanting to  
16 present the best side of himself, which I guess would be  
17 shocking if he didn't. There are limits on that, of course. If  
18 we spend a day with every member of Mr. Hamzeh's family coming  
19 in and telling about his fifth grade birthday party, I think I'm  
20 going to have to put a stop to that. I assume the defense is  
21 not planning something along those lines. So again, we will  
22 play that a little bit by ear. I'm not going to make a blanket  
23 ruling that the defense can't put in information about  
24 Mr. Hamzeh's relationships and his everyday life.

25           Under Seventh Circuit law, the Government has asked to

1 preclude the defense from defining reasonable doubt. The  
2 defense did not respond, I assume, because it knows full well it  
3 can't do that, so I will, of course, grant that motion. I was  
4 going to say I never had anybody try to do that. I had one  
5 person teeter pretty close one time. I wouldn't anticipate that  
6 in this case.

7                 The Government has moved to bar any kind of defense or  
8 argument that looks like an outrageous Government conduct  
9 affirmative defense, which has not been raised. And even if it  
10 were, the Seventh Circuit has said that's not -- that's not an  
11 appropriate defense. In the days when it was allowed as a  
12 defense, it was a jury question -- I mean a court question, not  
13 a jury question. The defense has said it doesn't plan to make  
14 any of those arguments now.

15                 Again, we get into the subtleties the defense says it  
16 may very well ask questions how appropriate is an investigation  
17 to have someone who has been recording, recording, recording and  
18 then one day suddenly stop recording and not do it for a month.  
19 I anticipate there will be questions around that. I'm not sure  
20 that is an outrageous Government conduct defense. That is what  
21 was going on here. What happened? You don't know, we don't  
22 know. And then the next thing that happens is X and what  
23 inferences can you draw from that? That's all appropriate, I  
24 think, in the context of this case. I would expect it.

25                 There's a motion with regard to one of the experts

1 that the defense wants to bring in. Markus Brauer. And Brauer,  
2 generally speaking, I think is going to testify to, just  
3 glancing over the report, how human beings influence other human  
4 beings in certain social settings and how peer pressure, I  
5 suppose, influences people's decisions to do certain things.  
6 And I guess one question I have, it doesn't seem to me, perhaps  
7 I'm incorrect -- Well, no let me take that back. Is the  
8 Government's argument, number one, that Brauer is not qualified  
9 as an expert under Daubert 702?

10 MR. PTASHKIN: Your Honor. With a lot of these  
11 witnesses, we're stressing Rule 704(b), and I think this is  
12 another situation where there's a line. Can under the Ninth  
13 Circuit case law and Third Circuit case the defendant's cited,  
14 can these witnesses say Mr. Hamzeh's IQ is 78, thus he is  
15 susceptible to influence? Yes. What the main point we're  
16 trying to make is, it really can't go further than that and ask  
17 these ultimate questions, which are barred from testifying about  
18 it by 704(b), was he entrapped? Did he have the mens rea to  
19 possess the gun? Was he predisposed? Was he induced? I think  
20 to some extent, it is a fine line.

21 To some extent, it really isn't. They can say his IQ  
22 is 78, and thus he is susceptible to influence. To really go  
23 any farther and attempt to apply that IQ level to the elements  
24 of the offense or the elements of the entrapment offense, we  
25 think is impermissible under Rule 704(b).

1                   THE COURT: Thank you for that clarification. So  
2 Mr. Albee, Mr. Bugni, were you planning to present the ultimate  
3 issues to these experts or simply to elicit the information  
4 about one's cognitive faculties and one's accessibility to  
5 manipulation if one's cognitive faculties fall under a certain  
6 category?

7                   MR. BUGNI: You put it well. We're not going to go  
8 past the line.

9                   THE COURT: Thank you. Generally, if the Government  
10 is of the view that we're wandering dangerously close to it, I  
11 expect objections at that point. So thank you. That clears  
12 that up for me.

13                  Professor Kimmel. The Government has objected, I  
14 assume, a similar objection with regard to how it was that the  
15 two informants interacted with Mr. Hamzeh, and how similar that  
16 is to how, perhaps, terrorist organizations seek to recruit  
17 people. And again, I think part of the Government's objection  
18 is if you're going to have this expert testify, say he wasn't  
19 predisposed, that's unacceptable.

20                  So tell me, Mr. Ptashkin, you know, are we kind of in  
21 the same general category? You're not necessarily objecting  
22 under 702, you're objecting to this witness testifying to the  
23 ultimate conclusions that the jury is supposed to draw?

24                  MR. PTASHKIN: That's correct, Your Honor.

25                  THE COURT: Okay. All right. Same answer?

1 MR. BUGNI: Same answer.

2 THE COURT: All right. Thank you. And same for  
3 Dr. Brauer, is that the case, Mr. Ptashkin?

4 MR. PTASHKIN: Yes.

5 THE COURT: With regard to all of these experts,  
6 Robbins, Brauer, this whole group of folks, testimony as to  
7 someone's cognitive function and how that relates to someone's  
8 accessibility, testimony about how certain kinds of pressure  
9 impacts people regardless of their cognitive functions and in  
10 particular with, perhaps, deficient cognitive functions is  
11 appropriate, but it's not appropriate to ask any of these folks  
12 so was he predisposed? Was he not predisposed? Was he induced?  
13 Was he not induced? Those are questions for the jury.

14 Dr. Sageman falls into a different category in my  
15 mind, and I hinted at this earlier when I talked about the  
16 questions and the jury questionnaire, and this has come up  
17 actually not only from the defense's proposed expert, but from  
18 the Government's proposed expert as well. And sorry, I'm  
19 flipping.

20 The Government wants to put in Dr. Matthew Levitt and  
21 his testimony, and the defense wants to put in Dr. Mark Sageman  
22 and his testimony. And as I understand it, both of these  
23 experts are experts in Middle East relations and particularly  
24 Israeli-Palestinian relationships. I am really concerned about  
25 going down this road. I understand that there were

1 conversations early on in which Mr. Hamzeh allegedly made some  
2 statements about going over to the Middle East and getting an  
3 Israeli soldier's gun and shooting Jewish people. I realize  
4 that. I understand that the Government is likely to argue that  
5 that is part of its evidence, that Mr. Hamzeh was predisposed to  
6 do something bad on a large scale, and that the defense is going  
7 to argue that no, it wasn't, it was talk.

8 I think some of that probably comes up through the  
9 experts that we've just talked about in terms of how people  
10 interact with each other. But it seems to me that the basis for  
11 both of these experts, you all asking for these experts to come  
12 in, is both of you are asking to kind of give a tutorial to the  
13 jury on relationships between Palestinians and Israelis or  
14 between Arabs and Jewish people. I think that's a huge  
15 quagmire, and I think it also assumes a fact that it shouldn't.  
16 It assumes that people on the jury are not going to be familiar  
17 with the fact that there is a conflict between certain, perhaps,  
18 Israelis and Palestinians and, perhaps, even between Arabs and  
19 Jews at large, not every Arab and Jewish person of that descent.

20 It assumes that the jurors are not going to be  
21 somewhat aware of that. Are people going to know about 1947 and  
22 are people going to know about where the Gaza Strip is and are  
23 people going to know about specific events that are listed, for  
24 example, in Dr. Levitt's expert witness report? Probably not.  
25 But I guess I got to say, I will be flabbergasted if we get

1 anybody on a 14-person juror who isn't aware that there is some  
2 historical enmity there and who would be confused if they heard  
3 that someone of Arab descent might have had some comments to the  
4 negative about some Israeli people.

5 I do not want this to turn into -- I think both sides  
6 commented on a mini-trial about the Middle East conflict,  
7 particularly when the issue that I think sort of precipitated  
8 the final moments of this offense was a different one.

9 The one thing that I do think conceivably could be  
10 confusing to a jury, and I'm not quite sure yet entirely how to  
11 address this, and I'm not necessarily giving you a ruling right  
12 now -- I'm giving you an opportunity to talk about it -- Is any  
13 belief or connection -- any belief that one might have that  
14 there is some sort of connection between free Masons and Isis?  
15 I think persons with some historical background found that,  
16 like, sort of goofy given that the free Masons allegedly are  
17 descendants of the Knights Templar, so that would seem sort of  
18 weird.

19 On the other hand, that to me seems more of something  
20 that your average run-of-the-mind juror might go, what, I don't  
21 understand what those things have to do with each other or why.  
22 One answer to that question might be I saw a video on YouTube  
23 that said it in which case you don't need to know the historical  
24 backgrounds of the religious underpinning. I just saw something  
25 on the internet that convinced me that this was a thing. So

1 that's the piece to me that while I don't think we ought to be  
2 having a seminar for the lucky jurors on learning the history of  
3 the conflict in the Middle East and the history of the conflict  
4 in Israel, I do see there may be a kernel of something there  
5 that needs explaining. I will give you each a chance to comment  
6 on this. This is my biggest concern.

7 MR. PTASHKIN: Your Honor, Dr. Levitt's testimony is  
8 integral to our case. It's extremely relevant and important,  
9 and here's why. He's not testifying about the big-picture fact  
10 that there is an Israeli-Palestinian conflict. He's discussing  
11 the specific facts that Mr. Hamzeh discussed in the recorded  
12 statements. I will give a couple examples. He talks about how  
13 the fact that it's much easier to get into the West Bank if you  
14 have an American passport as opposed to a Jordanian passport.  
15 He talks about the fact that he can join up with Hamas in the  
16 Gaza Strip. But in the West Bank, it would be much more  
17 dangerous to engage in terror activities because as Mr. Hamzeh  
18 called it, there are spies. And by that, I believe he's  
19 referring to people that are informants for the Israeli military  
20 and security services in the West Bank.

21 Mr. Levitt will explain while of course I agree with  
22 the Court, the jurors are going to know what the  
23 Palestinian-Israeli conflict is in general, are they going to  
24 know the differences between the security situation on the  
25 ground and the Gaza Strip versus the West Bank? Are they going

1 to know how critical it is to have an American passport if  
2 you're trying to go from Jordan into the West Bank is?

3 Mr. Levitt is going to testify about what is Hamas?  
4 What is the West Bank? What is the Gaza Strip? Respectfully, I  
5 don't think the average juror in the jury pool in the Eastern  
6 District of Wisconsin has that refined view of the facts. They  
7 know in general that there is this conflict, but they are not  
8 going to know what the Gaza Strip is as opposed to the West  
9 Bank. They're not going to know the issues about the passport.

10 So it's not going to be -- His testimony is not going  
11 to be broadly explaining why the Israeli side -- why Israel is  
12 justified in performing Operation Protective Edge. It's going  
13 to be what is Hamas? What is Gaza Strip? It is really going to  
14 be just a dry, academic lecture about the places, the security  
15 situations on the ground, and that is extremely necessary for  
16 the jury to hear because all those things are discussed by  
17 Mr. Hamzeh in his statements.

18 So why are those statements relevant to the charged  
19 offense? They're arguing Mr. Hamzeh was entrapped. Our counter  
20 argument is that in October, he was planning on flying to Israel  
21 to join Hamas and murder Israeli civilians. He discusses in the  
22 recordings that is a plan that far predicated those recordings in  
23 October. Eventually, the plan morphed, and he was going to do a  
24 mass-casualty attack at the Masonic Temple and murder civilians  
25 two blocks north of here. It's extremely relevant to his

1 predisposition to buy a machine gun that for months and months  
2 and months he wanted to commit a mass-casualty attack, which a  
3 machine gun, obviously, makes much easier than a handgun or a  
4 knife, and he discusses machine guns in these recordings  
5 consistently. Sometimes he does discuss a handgun, too.

6 THE COURT: I think you're blurring a lot of issues.  
7 I think what I'm hearing you say, Mr. Ptashkin, is that you're  
8 anticipating that the defense is going to argue that this was  
9 all just a bunch of yapping and posturing on Mr. Hamzeh's  
10 behalf. Forgive me for putting it that way. And you all are  
11 proposing to put forth Levitt's testimony to say actually what  
12 he was saying tracks with the realities on the ground.

13 MR. PTASHKIN: Exactly and tracks a sophisticated plan  
14 about how to commit a terror attack in Israel. I think this is  
15 also is extremely important given this defense about his IQ  
16 allegedly being 78. When you look at the sophistication of his  
17 statements in the recordings, and Dr. Levitt's testimony shows  
18 how that sophistication, how there was intelligent planning  
19 here, it rebuts the defense that this is a person with a low IQ  
20 who is incapable of plotting anything that requires strategic  
21 thought.

22 The recorded statements show strategic thought and an  
23 in-depth knowledge of the realities on the ground in Israel.  
24 And when he discusses those realities on the ground if there  
25 isn't an expert to explain how those statements are correct

1 statements of the reality on the ground, how is the jury going  
2 to understand? I don't think --

3 THE COURT: I think I understand what you said. Thank  
4 you. Mr. Albee, Mr. Bugni, you have two things to respond to.  
5 One is Levitt and the other is your own proposed expert.

6 MR. BUGNI: Two things, Your Honor. I just want to  
7 answer your direct question first. We don't think that you need  
8 an expert to explain the Masonic link to Isis. I just think  
9 that's very clear. They saw it on the YouTube video. I don't  
10 think that needs to be done at all. I think whatever Dr. Levitt  
11 would bring to that, it sort of goes to his boogymen statement  
12 that I think is completely inappropriate within his report.  
13 Demeaning those in the Middle East, you know, I can't remember  
14 the exact quote, but blaming all their woo's upon other people.  
15 I think that is completely inappropriate.

16 As far as the Government's real issue or their  
17 argument today, we put forth, Your Honor, much of that isn't  
18 relevant, all right. And what the Government's trying to do is  
19 trying to backfill what isn't relevant. And what they don't  
20 have as far as predisposition, any text messages, computer  
21 communications, anything that shows beyond talk and give the  
22 imprimatur of an expert to say no, no, this is really  
23 sophisticated. He talked, but he didn't do anything beyond  
24 talk.

25 So that idea doesn't bring it to what an expert needs

1 to do. An expert doesn't need to opine as to that.

2 MR. ALBEE: If I could just add one thing. The claim  
3 I think that that is sophisticated knowledge is in some way, I  
4 mean, these are, you know, who is in charge of Gaza? Who can  
5 travel where? To somebody in Menomonee Falls or something like  
6 that, maybe that would require a little research, but easily  
7 gotten. But to somebody who grew up in Jordan or Palestine or  
8 Israel, it is not sophisticated knowledge in any way.

9 The alternate on any of this stuff like, you know,  
10 what is Hamas? I know there have been some cases where the  
11 Government initially proposed Dr. Levitt and a definition was  
12 provided. This is what Hamas is. There's absolutely no need to  
13 get into this because although they call it dry and academic, as  
14 Mr. Bugni pointed out, Mr. Levitt, at least in his report,  
15 shares some, you know, what I think are pretty controversial  
16 views that would then require us also to provide some context as  
17 to what is happening there.

18 In terms of the sophisticated plan, almost all the  
19 conversations, Judge, are of a level of sophistication along the  
20 lines of, you know what we'll do? We'll grab the guns from the  
21 Israeli soldiers, shoot them and take their guns. It is  
22 preposterous. Those are the best trained soldiers in the world  
23 probably. That's just not going to happen, this Rambo kind of  
24 thing. It's the Palestinian Walter Mitty is what's coming out  
25 there.

1           Dr. Levitt's explanation of Hamas and going into the  
2 details of, you know, I think the Court was already pointing out  
3 and suggesting is, you know, to try to unravel this long  
4 historical, you know, issues there. It's just not a morass we  
5 should be wading into.

6           I won't address Dr. Sageman, I guess, until I get some  
7 sense into what the Court thinks. Our desire to put him on on  
8 these issues is related to Dr. Levitt's proposed testimony.

9           THE COURT: Well, I guess that's my question. I  
10 haven't -- I glanced over Levitt's report, which is extensive.  
11 And if the Government's thought was to put all of that in, then  
12 that's not happening.

13           MR. PTASHKIN: I apologize. Just on that question, I  
14 told Mr. Levitt -- Dr. Levitt to error on the side of including  
15 too much information. I would estimate his direct exam would  
16 take about an hour to an hour-and-a-half. It's going to be very  
17 high level. What is Hamas? The basic questions that he  
18 summarized at the beginning of the report. What is Hamas? What  
19 is the Gaza Strip? What is the West Bank? Are there Masonic  
20 conspiracy theories that exist in the Middle East? It's going  
21 to be very high level just discussing the facts of what these  
22 places are that are a 15-hour plane ride away from here, so that  
23 the 12 lay people on the jury have a sense of what are these  
24 places.

25           We are not going into an excruciating level of detail.

1 I note a lot of the specific facts that the defendant objected  
2 to in their motion in limine including -- We're not going to  
3 discuss the videos of training children, all those specific  
4 things. It will be very high level to answer those basic  
5 questions to put the defendant's own statements in context.

6 MR. ALBEE: Judge, an hour, hour-and-a-half?

7 THE COURT: That's what I just thought.

8 MR. ALBEE: I mean, Mr. Hamzeh wasn't a member of  
9 Hamas. There is no suggestion he ever joined them, took any  
10 action on their behalf, anything. It just doesn't matter. The  
11 Government -- I don't think they should be able to get into any  
12 of these conversations, by the way. But if the Court allows any  
13 of the conversations, the jurors don't have to know anything  
14 about the Middle East to know that I'm going to grab the guns  
15 and shoot people isn't a good thing. That's really what the  
16 Government wants. I don't think they should be able to get into  
17 that, which is a different question. You don't need to know who  
18 Hamas is for the Government to sell that point.

19 As I said, I think that should be excluded on 403  
20 grounds because it doesn't have anything to do with his  
21 predisposition to obtain machine guns, which is the charge here,  
22 and so I think that that leads to its own morass.

23 You know, for Dr. Levitt to testify about all the  
24 details of Hamas, I don't think any of this is relevant.

25 THE COURT: I know. I have not ruled on your request

1 to exclude any reference to allowing this.

2 MR. ALBEE: You know, it would be Hamas off the top of  
3 my head is probably a poor -- Hamas is a political organization  
4 that is in conflict with Israel and has been deemed responsible  
5 for a number of attacks against Israel. I don't know off the  
6 top of my head, I'm not sponsoring that definition, but nothing  
7 more would ever be needed than that. An hour-and-a-half?

8 THE COURT: I'm a little flabbergasted to hear an  
9 hour-and-a-half. That aside, Mr. Albee, let me ask you a  
10 hypothetical question. If I were to rule -- Number one, this is  
11 the first hypo. If I were to rule that the Government cannot  
12 call Dr. Levitt, would you all be seeking to call Dr. Sageman?

13 MR. ALBEE: We would not be calling him.

14 THE COURT: Number two, second hypo. If I allow the  
15 Government to put in limited testimony from Dr. Levitt, would I  
16 be correct in assuming that you all would want to call  
17 Dr. Sageman to address that limited testimony depending on what  
18 it was?

19 MR. ALBEE: I would guess that would be the case.

20 THE COURT: All right. I want to go back and read  
21 these reports in more detail and see what we're looking at. I  
22 can't give you a ruling on this today.

23 MR. ALBEE: The one thing I will be brief, Judge, on  
24 the Masonic part. Dr. Levitt which -- All that matters here is  
25 what Mr. Hamzeh and the informants were thinking. I mean,

1 there's nothing factual about this. Going back to the Court's  
2 original question. The New York times isn't reporting any link  
3 between the Masons and Isis. This doesn't really exist. And so  
4 to -- It's going to be a matter of who is responsible for  
5 creating this preposterous view that the Masons and Isis is  
6 linked, who is selling that to who and how that came about.  
7 There is no truth to it, so there's no need for expert testimony  
8 on something that is completely fictitious.

9                   THE COURT: Thank you all. As I said, I will have to  
10 get you a ruling on that. The same is true, the defense has  
11 moved to exclude or limit the Government's use of any of  
12 Mr. Hamzeh's discussions of any of these topics that we've just  
13 been talking about on the recordings, and I'm going to get you a  
14 ruling on that. I know that the Government needs it sooner  
15 rather than later, obviously, as does the defense, so you know  
16 what you all are or are not putting in. I promise I will try to  
17 get to it quickly.

18                   Docket No. 277, defense moved to exclude or limit any  
19 evidence that Mr. Hamzeh has gotten any speeding tickets or  
20 speeds when he drives or that he has gotten into a fight because  
21 he's not on trial for any of that stuff. The Government says it  
22 doesn't have any intention of getting into speeding, and the  
23 only reason that it might get into any kind of physical violence  
24 that Mr. Hamzeh has gotten into is if the defense comes in and  
25 says, he's never been physically violent or never been involved

1 in anything like that. Am I understanding that correctly?

2 MR. TAIBLESON: That's right, Judge.

3 THE COURT: So to that extent, I will grant the  
4 motion; although, again if the defense opens the door, I will  
5 allow the Government to walk through it.

6 The defense has asked me to preclude the Government  
7 from characterizing Mr. Hamzeh as a lone wolf, a terrorist or a  
8 mass murderer. And from the Government's response, the  
9 Government says, number one, it doesn't plan to refer to  
10 Mr. Hamzeh as a lone wolf. So okay, that problem is solved. If  
11 it does, I will sustain the objection.

12 The Government says it's going to put on "limited  
13 evidence" of Mr. Hamzeh's escalating claims to commit a mass  
14 murder. Again, this goes back to the ruling I have not given  
15 you about what I'm going to allow the Government to get into  
16 with regard to the conversations that preceded the purchase of  
17 the machine guns.

18 I will note, however, that I think the defense is  
19 absolutely right that if the Government has any intent to  
20 referring to Mr. Hamzeh as a terrorist or as a mass murderer  
21 even looking at this entire record, there's no evidence that  
22 Mr. Hamzeh committed a terrorist act. There is no evidence that  
23 Mr. Hamzeh murdered a mass or an individual, and it would be, I  
24 think, completely inappropriate for the Government to refer to  
25 him using any of those terms.

1           If I allow the Government to get into some of the  
2 conversations that we've talked about, and the Government can  
3 characterize what Mr. Hamzeh allegedly said he was going to do  
4 as an attempt to commit a mass murder. But to refer to him as a  
5 mass murderer or terrorist, I think, is completely  
6 inappropriate, and I will grant the motion to the extent that  
7 that's what it addressed.

8           Defense moves to preclude the Government from  
9 characterizing the defense of entrapment as a mere technicality.  
10 The Government says it doesn't plan to do that, but it is going  
11 to say he wasn't entrapped. Of course it's going to say he  
12 wasn't entrapped, and I will allow that. But if we -- I assume  
13 the Government is aware of this, if we start wondering toward a  
14 line of this is not really that big a deal, then we're getting  
15 into prohibited territory.

16           Obviously, if the defendant is entrapped and can  
17 convince a jury that he or she was, it is a big deal. So  
18 qualifying or characterizing an entrapment defense generally is  
19 not an appropriate argument. Responding to it and rebutting it  
20 is.

21           The defense has asked to prevent the Government from  
22 arguing that in order to prove the inducement clause of  
23 entrapment, the defendant needs to show that the inducement was  
24 somehow extraordinary. The Government responds that *Mayfield*  
25 didn't say, don't use the word extraordinary. It just said,

1       extraordinary is more than ordinary. That's a bizarre argument.  
2       Inducement does not have to be extraordinary. It has to be -- I  
3       don't think it's appropriate, and none of the cases that lead up  
4       to *Mayfield* or *Mayfield* itself said that the inducement has to  
5       be extraordinary.

6                   So, no, the Government can't argue that the inducement  
7       has to be extraordinary. You can certainly argue there wasn't  
8       inducement. I expect that that will probably happen, but we're  
9       not going to fight or quibble over the word extraordinary. I  
10      don't think that's what the law calls for, and I'm not going to  
11      allow that argument.

12                  The same thing with regard to the defense's motion to  
13      preclude the Government from speculating about Mr. Hamzeh's  
14      positional predisposition, which is this kind of notion of from  
15      the Second Circuit cases, including *Cromitie*. I've already  
16      ruled on that in the entrapment motion and in particular, I  
17      think I made clear in the decision that I issued with regard to  
18      entrapment.

19                  I realize that the defense has put forward in some of  
20      its pleadings that machine guns are not easy to get, that  
21      Mr. Hamzeh couldn't have just gone out on the street corner and  
22      bought a machine gun, and that's part of the Government's  
23      inducement argument. I understand that. I understand the  
24      defense wants to respond with, I think you propose an expert to  
25      say, sure you can. Sure you can buy a machine gun on the

1 street. But to the extent that the defense wants to argue that  
2 the recordings do indicate that Mr. Hamzeh was trying to get a  
3 handgun, that he was trying to get a pistol, and that one can go  
4 onto cites on line or, perhaps, he can go into a sporting goods  
5 store and purchase parts to convert a handgun into a  
6 semi-automatic or fully-automatic weapon, I'm not going to allow  
7 any argument to that extent. I can assume you all picked that  
8 up from my written ruling.

9 MR. TAIBLESON: And it was never our intent to do  
10 that. The point is just the defense intends to say it was  
11 difficult for him to do this. We would like to be able to  
12 respond and say that it wasn't. And to the extent that forms a  
13 predispositional analysis, that's as far as it is was going to  
14 go.

15 THE COURT: I want to be real specific about our  
16 terms. It was difficult to do this. The defense has said, it  
17 would be difficult to purchase a machine gun of the type that  
18 ended up getting purchased out on the street. And the  
19 Government, as I understand it, is going to present someone to  
20 say, no, it's not. You can buy machine guns on the street.  
21 What I'm saying is that can't go further into, you know, if you  
22 bought a perfectly legal weapon, there are ways you can convert  
23 it. I think that is stretching the predisposition argument far  
24 to far.

25 MR. TAIBLESON: So I just want to make sure that we're

1 clear. The variety of the machine gun that any person could buy  
2 on line for \$20 is exactly the machine gun under the statute  
3 that the defendant is charged with violating. That is a machine  
4 gun. The part on its own is a machine gun.

5 THE COURT: No, that's the problem, Mr. Taibleson.  
6 Now, we're getting into that is not what Mr. Hamzeh is alleged  
7 to have purchased. That is not the item that ended up in his  
8 hands on the 19th of January. And so I understand that  
9 technically under the statute, that thing can be defined as a  
10 machine gun. But what we're talking about here, you know it,  
11 the defense knows it, I know it. What we're talking about here  
12 is -- is an actual machine gun that's complete in and of itself.  
13 And so we're not going to go down a rabbit hole of there are all  
14 sorts of other things that are defined as a machine gun under  
15 the statute, under Title 26. And that if you attached them to  
16 what is not defined as a machine gun, it then becomes a machine  
17 gun.

18 MR. TAIBLESON: No, no, Judge. It's not that if you  
19 attach them they become a machine gun. It's just that that part  
20 on its own is a violation of the statute the defendant is  
21 charged with. And just in as much to my understanding of  
22 *Hollingsworth*, if a person is in a position to violate the  
23 statute, that satisfies the -- This is enormously important, the  
24 positional predisposition piece of the analysis. If he does it  
25 with a 9 millimeter machine gun, if he's capable of getting a 10

1 millimeter machine gun, he's capable of getting a submachine gun  
2 that fires automatically. All of that is enough to say that  
3 he's in a position to do it. And because the Government would  
4 like to argue he was in a position to buy an item that would be  
5 a violation of the statute, that that is enough to show he was,  
6 at least, in a position to do this. That's all. It is a very  
7 limited sort of argument about exactly the statute with which he  
8 is charged and the term.

9                   THE COURT: Again, I am -- I don't purport to be an  
10 expert on a \$20 dollar item that you can buy on Amazon.

11                  MR. TAIBLESON: Would Your Honor permit testimony to  
12 that effect?

13                  THE COURT: No, that's what I am trying to tell you.

14                  MR. TAIBLESON: I guess --

15                  THE COURT: Look. What you're telling me right here  
16 today, and this is what I tried to say in the order, is that I  
17 am in a position to buy a machine gun. I can go on Amazon, and  
18 I can buy that same --

19                  MR. TAIBLESON: That's exactly right. But you don't  
20 want to. So there are two pieces to this. One, is we don't  
21 intend to say he wanted to do it because it was on Amazon. We  
22 have the statement to say he wanted to do it. But the defense  
23 is going to argue he was not predisposed to commit this crime  
24 because even if he wanted to, it's really expensive to violate  
25 the statute and buy a machine gun.

1           We're not going to try to say any person with access  
2 wanted to. We're going to say under *Hollingsworth*, we have to  
3 satisfy the Seventh Circuit pattern jury instruction. I think  
4 it does a nice job summarizing this. We want to say he could  
5 have. It was reason to believe that he might not yet have found  
6 the means that probabilistically these were available. So we're  
7 not going to say that you or anyone else wanted to just because  
8 these are on line. We'll use other evidence for that. It is  
9 absolutely essential that the Government be able to put in  
10 evidence that whether it was a 9 millimeter or 10 millimeter or  
11 a box switch or submachine gun, any item that was capable of  
12 continuous fire, that he could have gotten one reasonably. We  
13 have to prove that, and that is evidence that we must be able to  
14 put in evidence of that to put on our case.

15           THE COURT: Well, I guess my understanding was, and I  
16 will go back and reread the pleadings. But my understanding was  
17 that what the defense had said was that you can't just go out  
18 and buy one of these things. These things, I assumed, meaning  
19 what ended up in Mr. Hamzeh's hands on the 19th of January on  
20 the street. If you want to put in evidence, and I thought you  
21 had proposed either a retired agent or somebody to say, yeah,  
22 you can, they're out on the streets of Milwaukee, you can find  
23 somebody to sell you one, I think that directly addresses that,  
24 and you're allowed to do that. I think going beyond that and  
25 saying and there are also these other 50 million ways you could

1 have gotten it, quite frankly, I think in some senses, that  
2 argument is counterproductive. Because if it were that easy, I  
3 don't know why we spent four months allegedly going through all  
4 this. I think that confuses the issue. I think it steps  
5 outside of the facts of what we had here.

6 MR. TAIBLESON: Judge, would you permit additional  
7 briefing on this issue, limited briefing just to explain? Maybe  
8 I just didn't explain it very well in the briefing, how we are  
9 not attempting to show he wanted to do it because there are a  
10 whole different set of machine guns he could have purchased.  
11 Just that under the probabilistic analysis *Hollingsworth*  
12 requires in this circuit, it informs the jury -- We have to tell  
13 them the whole set of ways he could have done this and whether  
14 they were available to him. That's all.

15 THE COURT: If you want to argue that, you can give me  
16 something by Wednesday.

17 MR. TAIBLESON: Thank you, Judge.

18 THE COURT: I will give the defense an opportunity to  
19 respond by Friday.

20 MR. TAIBLESON: Thank you, Judge.

21 MR. BUGNI: Your Honor, if I -- Just to avoid a  
22 problem, we want to make sure the Government's expert, John  
23 Lindamen, they noticed. We assumed it would be in response to  
24 John Davis. He was talking about this machine gun, which is  
25 what we are all operating under the last three years. Their

1 expert isn't going to go and talk about these convergent parts  
2 and everything else. I didn't take that to be part of it until  
3 right now.

4 THE COURT: That's what I'm telling you. I'm not  
5 comfortable with going that direction. Mr. Taibleson says that  
6 he wants to explain why he ought to be able to. I am giving you  
7 a chance to respond.

8 MR. BUGNI: Okay.

9 THE COURT: Docket No. 219, not 219, I'm sorry, Docket  
10 No. 277. The defense moved to preclude the Government from  
11 introducing evidence from Mr. Hamzeh's laptop, mobile phone,  
12 Play Station, pole cameras. The Government says it is not going  
13 to do that. I think I can grant that motion.

14 MR. ALBEE: Judge, they added the words in their case  
15 in chief in there. I think it would have been clear from the  
16 order initially that if there's any intent to use anything from  
17 the computer, the Play Station or cell phone, that we turn it  
18 over. It wasn't in the case in chief kind of thing. The whole  
19 point of the motion that we made was to avoid having to find an  
20 expert or go back through a computer. We didn't think there was  
21 anything there. But if there was, we wanted to be able to have  
22 somebody examine it. We are asking the Court be --

23 THE COURT: At all and not in the case in chief.

24 MR. PTASHKIN: Your Honor, the only comment I would  
25 make about that is Exhibit 27 on our list is an exhibit video of

1 the defendant at 9Rounds. This is something the defence  
2 provided us as one of their exhibits. I believe this is off of  
3 the defendant's cell phone so --

4 MR. BUGNI: We can work that out, Your Honor. If it  
5 is limited to that one video, we'll work it out.

6 MR. PTASHKIN: If they're going to use it, thus we put  
7 it on our exhibit list. Aside from that, we are not using  
8 anything from the cell phone and the Play Station. I just  
9 wanted to mention that one exhibit because we believe that might  
10 be from his cell phone.

11 MR. BUGNI: Fair enough, Your Honor.

12 THE COURT: Thank you. This next objection, which is  
13 at 277 may go to what Mr. Bugni was talking about earlier, which  
14 is the defense has moved to preclude the Government from  
15 challenging the defense translations of disks 104 to 106 or  
16 Bates 151 and 272 to 465. Is this the re-numbering?

17 MR. BUGNI: No. We had a separate translation done of  
18 the last day of the 25th. I believe we worked that out with the  
19 Government. The stipulation covers the authenticity of it, and  
20 we're going to work out the accuracy. We made the final change.  
21 It will be covered by the stips. You don't need to worry about  
22 it.

23 MR. TAIBLESON: That's right.

24 THE COURT: Thank you. I appreciate that. We've  
25 already talked about Docket No. 278 and Dr. Levitt. I'm going

1 to take a look at that. And the only other two things that I  
2 have on the list are there were some motions to seal 274 and  
3 265. Government's motion to seal I think relates to the  
4 protective order and the fact that the Government was asking to  
5 seal because there is a protective order in place. Am I  
6 recalling that correctly? It's your response to what the  
7 defense filed earlier this month about --

8 MR. TAIBLESON: About Mike?

9 THE COURT: Yes.

10 MR. TAIBLESON: Yes. Our position is that needs to be  
11 sealed.

12 THE COURT: And the other one regards something that  
13 everybody has been sealing. I don't think we have an issue with  
14 that. I can deal with those.

15 MR. BUGNI: What was the other one?

16 THE COURT: There's a motion to seal Docket No. 279.  
17 I think if you take a look at it, you'll understand.

18 MR. BUGNI: The text messages? Thank you.

19 THE COURT: I'll take care of those. The -- So I owe  
20 you some rulings on some of this and some voir dire. In terms  
21 of sort of housekeeping practicalities, and I will give each of  
22 you an opportunity to let me know things you'd like to talk  
23 about that we haven't hit on this morning.

24 In terms of housekeeping practicalities, what I would  
25 like to do and we can talk about this more at our next get

1 together, I am hoping to have you all on the first morning of  
2 trial -- Well, let me back up. As I understand it right now,  
3 there may be three trials scheduled for the 21st. I believe  
4 Judge Stadtmueller has two civil cases that are on the calendar  
5 right now for the 21st. I believe Judge Duffin may have one,  
6 and then we've got this one. I don't know whether Judge  
7 Stadtmueller's are going to go. He's senior to me, but those  
8 are civil cases and not criminal cases, and I don't know. I  
9 need to try to figure out whether we will be getting a pool  
10 first. I would like to hope so because we need to get started  
11 right away on the first morning of trial. I wanted to give you  
12 all a head's up that I need to sort that and figure that out.  
13 As soon as I know that for sure, I will let you know.

14 For the moment, let's imagine that we get the pool  
15 first. What I'm hoping is that you all can be here 8:00, 8:15  
16 to do any kind of pretrial housekeeping we need to do. I would  
17 like to have butts in seats at 9:00 and start the preliminary  
18 instructions and voir dire at 9:00 in the hope that we can move  
19 as quickly through jury selection as possible while still giving  
20 everybody the freedom to do what they need to do.

21 So the first day we will take breaks as needed. We  
22 will take a lunch break as needed in terms of how we are doing  
23 in terms of jury selection. Once we get the jury selected,  
24 however, what I'd like to do, depending on how we're moving, is  
25 have a 9:00 to 5:00 or 5:15 trial schedule. Have you get here a

1 few minutes before 9:00 to talk about housekeeping issues, and  
2 we actually start at 9:00, give the jurors a break mid-morning  
3 to stretch their legs, do what they need to do. So we can give  
4 them an hour lunch. I prefer to do that because they have to  
5 leave the building, and then afternoon break and try to finish  
6 around 5:00 or 5:15. If it looks like we're dragging under that  
7 schedule and we're not making decent time, we can move them back  
8 and have them come back at 8:30, and we can shorten the lunch.

9           The concerns I have, and I know not everybody does it  
10 this way, but the concerns that I have about really extended  
11 trial days, as you know, we get jurors from far reaches.  
12 Sometimes we get jurors who get hotels room here for the time  
13 they're going to be in trial. We want them to be able to pay  
14 attention. And so I'd like to avoid putting them through a  
15 longer day and then worrying about how they are going to get  
16 home to Menomonee Falls or wherever they are coming from to be  
17 able ensure they keep their attention here.

18           My normal practice is to allow them to takes notes,  
19 and we provide notebooks and pens for them. They don't get them  
20 during opening. They don't get them during closing. Those,  
21 obviously, are not evidence. As soon as the closing statements  
22 are finished, then we distribute out the notebooks. Every time  
23 they leave the courtroom, we make them leave their notebooks in  
24 their chairs, and they are re-distributed to them the next  
25 morning when they come back.

1           And I have instructions which I think you all may have  
2 seen in the preliminaries, and then I also give them the final  
3 instructions, the fact that the notes are not evidence and you  
4 have to rely on your recollections, and you can't rely on  
5 somebody else's notes if you chose not to take notes. If anyone  
6 has strong objections to allowing note taking, I am happy to  
7 hear that.

8           MR. TAIBLESON: None.

9           MR. ALBEE: No, Your Honor.

10          THE COURT: We'll follow that practice, and we'll  
11 allow them to take notes during the trial. I would ask you all  
12 to when you're prepping your witnesses, let them know things  
13 like the fact that they'll have to come through security to get  
14 into the building, so they can build that in for the time for  
15 them to get into the courtroom. We will have two witness rooms  
16 back there. We'll have those open. And if you all think that's  
17 not sufficient, let me know, and we'll see if we can open across  
18 the hall as well and get additional space to let witnesses wait.  
19 I am happy to do that. We can find extra space for witnesses to  
20 wait.

21          Let them know they'll have to go through security and  
22 let them know they will have to leave the building to eat,  
23 unless they want to live out of the vending machine like people  
24 who work here do in which case they don't have to leave the  
25 building, but that time needs to be built in.

1           I am very much hoping, and I know you all will try, to  
2 line up as many witnesses as possible each day assuming that you  
3 can gauge how long your witness is going to take, so we don't  
4 run out of witnesses at the end of the day. I understand you  
5 may be having people coming in from somewhere, and they don't  
6 want to come in on Monday if they're not going to testify on  
7 Monday. I get it. I don't want anybody to incur anymore  
8 expense then they have to. By the same token, given what we  
9 have to get through here, it will be important to try to fill  
10 each day and not find ourselves at 3:15 with nobody for the next  
11 day. To the extent that you can think of an alternative  
12 witness, for example, if you've got three witnesses that you can  
13 put on in an afternoon, you know you will only get through one,  
14 but if for some reason that one doesn't take as long, as least  
15 you have an alternative witness in the wings that you can pull  
16 in. That will be helpful in moving things forward.

17           In terms of -- We talked about the digital evidence,  
18 the recordings, but I'm assuming that there will be other forms  
19 of evidence. I haven't gone over the exhibit list in detail. I  
20 am assuming that there will be. If there are exhibits that you  
21 anticipate physically handing to the jury to look at, for  
22 example, if you have a binder of photos that you would like for  
23 the jury to look at, I'd like you to confer with the other side,  
24 make sure the other side has seen that, and that it be organized  
25 and identified. If there are multiple exhibits in such a

1 binder, I think that we need to have a practice of instructing  
2 the jury that they can't look at an exhibit until after it has  
3 been admitted, and then they can only look at that particular  
4 tab, so there should be tabs in the exhibit binders, if that is  
5 what you plan to do. If everything will be on the screen, we  
6 don't need to worry about that. Everybody will see everything  
7 at the same time.

8                 One of the things I encourage you all to think about.  
9 You come in here, get the lay of the land of the courtroom and  
10 you figure out the tec. We have the capacity here. Ms. Wrobel  
11 controls it, that when someone asks to introduce an exhibit, we  
12 can show that exhibit just on the screens here so that I see it.  
13 And we can also have it so you all see it. Once I rule that  
14 it's admitted, then she can transfer it into the jury box and if  
15 necessary to the bigger screen, and then jurors can see it. So  
16 to that end, it's important for you all to say, you know, that  
17 you know you want to show me something, and then may I publish.  
18 Usually I won't worry too much about those formalities or  
19 technicalities. But the words may I publish and my answer yes  
20 is a signal to Ms. Wrobel now she can throw it over into the  
21 jury box from here, so that's something to be aware of.

22                 Also, please be aware there's sometimes a momentary  
23 delay. You say can we show the witness Exhibit No. 27, it may  
24 take a second or two for it to come up on the screen. Let  
25 witnesses know not to panic if it doesn't pop up right away.

1 They should be able to see it.

2           Mr. Taibbleson, Mr. Ptashkin, you have to keep that one  
3 screen turned toward you. We had an incident in a trial several  
4 weeks ago in which an attorney was questioning from the podium  
5 to the witness stand and turned that screen around so that she  
6 could see the exhibit she was asking about, which meant that the  
7 jury could see it too, and it hadn't been admitted yet. So if  
8 you need to look at an exhibit, we'll need to put a screen up  
9 back here or find a way for you to look at it. It can't be  
10 turned toward the jury.

11           Also, be aware in this courtroom it really helps  
12 Ms. Armbruster if you are close to the mic or to a mic when you  
13 are questioning. So that if you're seated at counsel table,  
14 that always works. If you are standing up here showing  
15 something to a witness if you can stand next to the mic and  
16 share the mic with a witness, that's helpful. Standing out in  
17 the middle of the well and asking questions even if you have a  
18 strong voice, somehow this room can sometimes swallow that up,  
19 so just be aware of those logistics.

20           If you want to use the podium to question witnesses,  
21 you can; although, it's weird in this courtroom. It means you  
22 have your back to the jury. It's a strange staging. So  
23 generally, I think most people elect to use the podium to do  
24 their opening or closing, but they question from the table. I  
25 am not telling you you have to do that. Be aware if you

1 question from the podium, it's kind of a weird set up in here,  
2 and we probably need to know that ahead of time so we can get it  
3 moved to where you need it to be moved.

4 Mr. Taibbleson, Mr. Ptashkin, things we haven't covered  
5 yet today that you think we ought to talk about or questions?

6 MR. TAIBLESON: No Judge. Thank you.

7 THE COURT: Mr. Albee, Mr. Bugni.

8 MR. BUGNI: One second.

9 MR. ALBEE: Judge, just two things. We talked about  
10 CIPA in connection with issues with Mike. We also had some  
11 pending issues in terms of interception of texts and telephone  
12 conversations.

13 THE COURT: Is that the most recent?

14 MR. ALBEE: It's most recent as to texts, and it has  
15 been pending for awhile on telephone conversations. It is our  
16 review of the discovery we received indicates to us certainly  
17 that there were texts and telephone conversations that were  
18 intercepted. We don't have any other explanation. We've asked  
19 for an explanation how else they could have been obtained. The  
20 Government has --

21 THE COURT: I'm sorry, the only reason I am  
22 interrupting you is this is part of the omnibus objection to  
23 Judge Duffin's rulings on the Motion to Compel the Discovery  
24 Motion, is that right, and you're waiting for my ruling on the  
25 objections?

1                   MR. ALBEE: On the telephone conversations. And then  
2 one of the supplemental things we recently found out with the  
3 texts that were intercepted.

4                   THE COURT: And that is part of the order that I  
5 indicated to you I have pretty much drafted and made a  
6 determination that there was no clear error, but I will get  
7 that.

8                   MR. ALBEE: Yeah. And if I could just make one point  
9 on that. One of our concerns is that it's not just -- Well,  
10 when there's a secret investigation going on, it's a big concern  
11 of ours. And I know the Court understands that and CIPA allows  
12 that to some extent, but it doesn't allow for *Brady* material to  
13 be concealed. We don't know by what mechanism those were  
14 obtained. But also the problem if there are an abundance of  
15 texts or conversations that were obtained and they don't know  
16 anything about Mr. Hamzeh, I presume if they had, we would have  
17 received them. They would be happy to say, here he is doing  
18 something stupid or dangerous or whatever. The fact that, for  
19 example, they have all the texts for whatever period of time and  
20 conversations for whatever time, he's not talking about anybody  
21 in the world about doing bad things. He's talking about work  
22 and hanging out with friends at the coffee shop and the other  
23 things he did in his life, that that's *Brady*. I don't think the  
24 Government has ever understood that. I don't know that we have  
25 had a whole arm to really explain that position. That is the

1 additional point we wanted to make about CIPA.

2                 The other issue is as Mr. Bugni indicated we've now I  
3 think after getting the lined transcripts with the line numbers  
4 on them, we're able to produce the excerpts that we intend to  
5 rely on, which are recordings of Mr. Hamzeh's conversations with  
6 Mike and Steve. I think it would be helpful to the Court if we  
7 tried to identify a little more precisely why we think those are  
8 admissible conversations. It's a little bit of a tedious  
9 process for us. You know, it is probably more tedious than for  
10 the Court. If we can have until next Friday to submit our  
11 explanation for why we think those are admissible over any  
12 hearsay objections by the Government.

13                 THE COURT: I think that's fine. That would be  
14 helpful to both me and the Government. Yes, you can have until  
15 Friday to do that. I will take a look at it. Thank you for  
16 that.

17                 MR. BUGNI: You Honor, if I could just echo one point  
18 of Mr. Albee. I know you already made a decision, and we are  
19 getting the CIPA ruling. There is one other fact. We don't  
20 have all the text messages from the informants to Mr. Hamzeh,  
21 and that had been a big issue is that we really want all of  
22 those text messages. And if there was intercept, that's where  
23 we would be able to get those. Those would be *Brady*, and those  
24 would be material. Thank you.

25                 THE COURT: Anything else we need to cover this

1 morning?

2 MR. TAIBLESON: No. Thank you, Judge.

3 THE COURT: Anything else that I am capable of  
4 covering with the mushy thing inside of my head that I'm  
5 identifying as a brain? Thank you everybody.

6 (Whereupon proceeding was concluded.)

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C E R T I F I C A T E

I, SUSAN ARMBRUSTER, RPR, RMR, Official Court Reporter for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of my original machine shorthand notes taken in the aforementioned matter to the best of my skill and ability.

Signed and Certified October 9, 2019.

/s/Susan Armbruster

Susan Armbruster

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